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Supreme Court of the United States

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LAWRENCE F. GLASER and MAUREEN GLASER, individually and on behalf of KIMBERLY, ERIN, HANNAH, and BENJAMIN GLASER,

Petitioners,

versus

ENZO BIOCHEM, INC., HEIMAN GROSS, BARRY WEINER, ELAZAR RABBANI, SHARIM RABBANI, JOHN DELUCCA, DEAN ENGELHARDT, and DOES 1-50,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005) requires a private plaintiff alleging a face-to-face state common law fraud to plead and prove that his hundred million dollars in losses occurred after the falsity of defendants' representations were disclosed to the market when defendants contend that their representations were not false and have made no public announcement admitting to the falsity of the representations.

Whether the standard of review for denial of a motion for leave to amend on the basis of futility is abuse of discretion or de novo.

LIST OF PARTIES

The parties in the courts below are:

Plaintiffs-Appellants: Lawrence F. Glaser and Maureen Glaser, individually and on behalf of Kimberly, Erin, Hannah, and Benjamin Glaser (hereinafter referred to as "Glaser"), Virginia citizens.

Defendants-Appellees: Enzo Biochem, Inc., which is incorporated and has its principal place of business in New York, Heiman Gross, Barry Weiner, Elazar Rabbani, Sharim Rabbani, John DeLucca, Dean Engelhardt, and Does 1-50, who are all residents and citizens of New York.

Glaser is the petitioner in this Court and Enzo and the individual Defendants are the respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS AND JUDGMENTS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
Introduction	3
I. Statement Of Facts	5
II. Course Of Proceedings And Disposition In The Court Below	7
REASONS FOR GRANTING THE PETITION	10
I. THE RULING BELOW IS CONTRARY TO THIS COURT'S OPINION IN *DURA* AND THE SECURITIES LITIGATION UNIFORM STANDARDS ACT	11
A This Court's Interpretation Of *Dura*	11
B. The Effect Of The Court Of Appeals Decision Is Contrary To The Securities Litigation Uniform Standards Act And *Merrill Lynch v. Dabit*	14
II. EVEN ASSUMING ARGUENDO PETITIONERS WERE REQUIRED TO PLEAD LOSS CAUSATION, THEY HAD DONE SO	18

TABLE OF CONTENTS – Continued

Page

III. THE QUESTIONS PRESENTED ARE IMPORTANT 22

IV. THE COURT OF APPEALS APPLIED THE INCORRECT STANDARD IN DENYING PETITIONER'S MOTION FOR LEAVE TO AMEND 24

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Ayling, 396 F.3d 265 (3d Cir. 2005) 24

Basic, Inc. v. Levinson, 480 U.S. 224 (1988) 12, 13

Bates v. Dow Agrosciences, LLC, 544 U.S. 431 (2005) 18

Dura Pharmaceuticals, Inc. v. Broudo, 125 S. Ct. 1627 (2005) ..... *passim*

Dura Pharmaceuticals, Inc. v. Broudo, 339 F.3d 933 (9th Cir. 2003) 11

Dura Pharmaceuticals, Inc. v. Broudo, 2003 U.S. Briefs 932 12

Ellis v. Chao, 336 F.3d 114 (2d Cir. 2003) 24

Foman v. Davis, 371 U.S. 178 (1962) 25

In Re Parlamat v. Sec. Litig., 375 F.Supp. 2d 278 (S.D.N.Y. 2005) 20

J.D. Marshall Int'l, Inc. v. Redstart, Inc., 935 F.2d 815 (7th Cir. 1991) 24

J.I. Case v. Borak, 377 U.S. 426 (1964) 15

Lawal v. RTM, 2006 U.S. App. LEXIS 30856 (11th Cir. 2006) 25

Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006) 25

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 18

Merrill Lynch v. Dabit, 126 S. Ct. 1503 (2006) 10, 16, 17

Strolberg v. Akal Security, Inc., 2006 U.S. App. LEXIS 30440 (9th Cir. 2006) 25

TABLE OF AUTHORITIES – Continued

Page

Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87 (2d Cir. 2001) 20

Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971) 13, 15

STATUTES

15 U.S.C. §78bb(f)(5)(B) 2

15 U.S.C. §78u-4(b) 2, 7

15 U.S.C. §78u-4(e)(1) 16

28 U.S.C. §1254(1) 2

F.R.C.P. 8 17

F.R.C.P. 9(b) 7

Private Securities Litigation Reform Act of 1995 §27(a) 13

Securities Exchange Act of 1934 §10(b) 13, 15

Securities Exchange Act of 1934 §10(b)(5) 13

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioner Lawrence F. Glaser and Maureen Glaser, individually and on behalf of Kimberly, Erin, Hannah, and Benjamin Glaser respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered in this matter on September 21, 2006.

OPINIONS AND JUDGMENT BELOW

The Fourth Circuit's September 21, 2006 opinion is reprinted at App. pages 1 to 12, which is published at 464 F.3d 474. The Opinion and Judgment of the first panel of the United States Court of Appeals for the Fourth Circuit, entered on March 21, 2005 is reprinted in the Appendix at pages App. 13 through App. 35, which is an unpublished opinion. The Memorandum and Order of the United States District Court for the Eastern District of Virginia, dated August 17, 2005, denying the Motion to Reconsider and for leave to file an amended complaint is reprinted in the Appendix at pages 36 to 38 and is an unpublished opinion. The Memorandum and Order of the United States District Court for the Eastern District of Virginia, dated July 14, 2005, is reprinted in the Appendix at pages 39 to 49, and is published at 2005 U.S. Dist. LEXIS 44188. The Fourth Circuit's denial of the Request for Rehearing en banc on October 18, 2006 is reprinted at App. pages 50 to 51.

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on September 21, 2006 affirming the judgment of the United States District Court for the Eastern District of Virginia dismissing the Petitioner's amended complaint with prejudice. A timely petition for rehearing en banc was denied on October 18, 2006. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves Title 15 U.S.C. §78u-4:

(b) Requirements for securities fraud actions.

(4) Loss causation. In any private action arising under this title [15 USCS §§ 78a et seq.], the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title [15 USCS §§ 78a et seq.] caused the loss for which the plaintiff seeks to recover damages.

This case also involves Title 15 U.S.C. §78bb(f)(5)(B):

(5) Definitions. For purposes of this subsection, the following definitions shall apply:

(B) Covered class action. The term "covered class action" means – (i) any single lawsuit in which – (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves

and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which – (I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

STATEMENT OF THE CASE

Introduction

The issue in this case is whether the loss causation pleading requirements established by this Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005) for plaintiffs who invoke the fraud-on-the-market theory in a private securities fraud claim under federal securities laws apply to individual private fraud claims brought under state common law. Specifically, this case raises the question of whether Petitioners' amended complaint for face-to-face fraud based upon Virginia common law must be dismissed with prejudice for failure to plead loss causation as mandated by *Dura*. In this case, three months prior to the *Dura* decision, the Fourth Circuit reversed the district court's order dismissing Petitioners' Virginia common law fraud claim, holding that Petitioners' amended complaint as stated set forth a claim for common law fraud under Virginia law. On remand, the district court, relying upon the intervening authority of this Court's decision in *Dura*, once again dismissed Petitioners' amended complaint with prejudice for failure to plead loss causation and denied Petitioners leave to file an amended complaint. The Fourth

Circuit upheld the district court's dismissal of the amended complaint with prejudice, holding that the loss causation pleading requirements established in *Dura* applied to state common law fraud cases even when they are brought by individual plaintiffs who have not invoked the fraud-on-the-market theory as a basis for their claim.

In determining whether to grant this Petition, Petitioners respectfully request that this Court undertake its consideration recognizing that Respondents, at Enzo's January 2000 annual shareholders' meeting, falsely told Petitioners and the other shareholders that Respondents' gene therapy killed the HIV virus, that while the FDA would not permit them to say they cured AIDS they could say: a) that they killed the virus, b) their gene therapy "works," c) that their gene therapy was "like a roach motel – The virus goes in but doesn't come out" and d) that they were "moving from Phase I to Phase II testing." Petitioners relied on these material statements and continued to purchase Enzo stock culminating in an investment position after the shareholders' meeting valued at over $100 million. When the key milestones (e.g. opening of clinics in three months and moving from Phase I to Phase II testing) did not occur, the market price dropped from $139 per share to $21.81 per share a year later. Due to the decline in share price, Petitioners' account, which was on margin, was liquidated, creating a deficiency which forced Petitioners into bankruptcy. Notwithstanding this sequence of events, Petitioners were deprived of an opportunity to prove their claim because Enzo had never publicly announced that its gene therapy was not efficacious. Seven years have now passed and Enzo is still in Phase I testing, there are not clinics opened, the stock price is $15.81, and

still no shareholder who invested based on those representations has a claim because Enzo has not publicly announced that the representations that were made were false.

I. Statement Of Facts

Petitioners filed this action on August 22, 2003, alleging violations of the federal securities laws, Virginia securities laws, and common law fraud. In particular, Petitioners alleged that Enzo and the individual Respondents conspired to inflate the market price of Enzo stock so that certain individual Respondents would be able to dump their shares at an inflated price. **(Sealed App. 257, ¶ 7.)**[1] The focal point of Petitioners' complaint was false and misleading statements made at the annual Enzo shareholders' meeting in January 2000. **(Sealed App. 266, ¶ 44.)** At that meeting, the shareholders and the investment public were told, among other things, that Enzo's HIV gene therapy "worked." **(Sealed App. 267, ¶ 48.)** They were told the FDA would not let them say that they had cured HIV, but could say that they killed the virus. **(Sealed App. 267, ¶ 49.)**

The individual Respondents, who had held their shares in Enzo for over 16 years and had never sold any of their shares, purposely used this artifice and device to pump the price of the stock. **(Sealed App. 262, ¶ 31.)** In November 1999, when Respondents are alleged to have decided to artificially inflate the price of Enzo, the stock was approximately $10/share. **(Sealed App. 263, ¶ 32.)**

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[1] The "Sealed Appendix" refers to the appendix filed in the United States Court of Appeals for the Fourth Circuit. "Appendix" refers to the appendix attached to the petition for certiorari.

After the promise (e.g. to the institutional investors at a November 1999 presentation) of their therapy and announcements to be made at the January 2000 shareholders' meeting, the stock rose to approximately $44/share. **(Sealed App. 110, 134, 142.)** After the shareholders' meeting, the stock skyrocketed from $44/share to $139/share in eight trading days (January 12 to January 24) and the volume, which in 1999 had been approximately 1 to 6 million shares/month **(Sealed App. 134)** rose to 13 million shares in eight trading days. **(Sealed App. 266, ¶ 45; 754.)**

During the initial hype, one of the directors sold all of his holdings for approximately $2 million. **(Sealed App. 254, ¶¶ 10, 72.)** On March 28, 2000, three of the five directors sold a total of 600,000 shares at $81/share. **(Sealed App. 273, ¶ 74.)** The following day, Respondent Engelhardt, the chief science officer, sold 5,000 shares at $70/share. **(Sealed App. 273, ¶ 73.)** Two weeks later, the stock was trading at $35/share. **(Sealed App. 273, ¶ 76.)**

Beginning in late April or early May 2000, Respondents began a new round of hype in connection with the progress of the clinical trials for Enzo's HIV therapy and leaked other rumors, such as a major diagnostic deal, which resulted in the stock recovering from $35/share to the mid-70's/share by the end of July 2000. **(Sealed App. 254, ¶¶ 77, 95; Sealed App. 298.)** The three directors who had sold the combined 600,000 shares in March 2000 and Respondent Engelhardt agreed to a private placement in which they would have dumped additional shares.[2] **(Sealed App. 281, ¶ 95.)** The private placement memorandum is

[2] The number of shares to be sold and the price are contained in a sealed document and can be found in the Sealed Appendix at 281 ¶ 95.

dated Friday, July 21, 2000. **(Sealed App. 300.)** Two trading days later, July 25, the stock, which had been trading at approximately $70/share, collapsed to $58/share. **(Sealed App. 749.)** Petitioners alleged that when institutions read the private placement, they knew that the statements the company had made concerning the progress of its trials and the ultimate value of the stock were inflated and began dumping the stock, which led to the dramatic drop-off. **(Sealed App. 283, ¶ 101.)**

Petitioners, who had a core position of approximately 490,000 shares on margin at the end of 1998, leveraged themselves as a result of the increase in the market price to over one million shares in April 2000. **(Sealed App. 261, ¶¶ 24-26.)** When the market realized the price of the stock had been inflated, it dropped precipitously. **(Ap. 273, ¶ 76; 298.)**[3] As a result of the market fluctuation, plaintiffs' account was liquidated, margin debits remained, and plaintiffs were forced to file for protection under Chapter 11 of the Bankruptcy Code. **(Sealed App. 259, ¶ 12.)**

II. Course Of Proceedings And Disposition In The Court Below

The amended complaint, which contained claims for both federal securities law and Virginia common law fraud, was dismissed as the district court held that the statute of limitations for securities law fraud had expired and also that it did not satisfy the pleading requirements of either the Private Securities Law Reform Act (hereinafter "PSLRA"), 15 U.S.C. § 78u-4(b), or Fed. R. Civ. P. 9(b).

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[3] "Ap." refers to the appendix filed in the Fourth Circuit while "App." refers to the appendix attached to this Petition.

(Sealed App. 33).[4] The district court found that the alleged misstatements concerning Enzo's gene therapy was immaterial as a matter of law because the announcement was made in conjunction with the Phase I testing, which the district court believed to relate solely to safety and not efficacy. On appeal, a panel of the Fourth Circuit vacated the judgment because it found that the alleged fraudulent statements were material and that all the elements necessary to state a claim under Virginia common law for fraud had been alleged. "As the plaintiffs have adequately alleged a claim for common law fraud, amendment of perceived deficiencies in that claim is unnecessary." **(Ap. 102)**. The panel remanded the case to the district court for further proceedings.

Immediately on remand, Respondents again moved to dismiss on the grounds that (1) there were insufficient allegations of loss causation to state a claim for common law fraud, and (2) the Fourth Circuit had allegedly held that a claim had not been stated against some of the individual defendants on a conspiracy theory. The district court applied this Court's intervening decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005),

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[4] Under the Fourth Circuit's formulation for Petitioners, it was literally "heads I win, tails you lose." The original panel ruled that the statute of limitations had expired because Petitioners had knowledge of the fraud more than one year before the suit was filed. The second panel ruled that Petitioners did not have a claim because the alleged falsity was disclosed on March 8, 2001 after their shares had been liquidated. Thus the Petitioners could not have filed a lawsuit prior to March 8, 2001 because there had been no public disclosure of any kind regarding the falsity of the representations. Hence, the Fourth Circuit on one hand bars the Petitioners' claims as untimely based on the statute of limitations and on the other, premature under the corrective public disclosure requirements of *Dura* even though Petitioners never based a claim on the fraud-on-the-market theory.

and dismissed the amended complaint for failure to adequately plead loss causation and dismissed the individual Respondents on the ground that the first panel had previously dismissed the conspiracy claims. The second panel in the Court of Appeals followed suit, "[W]e agree with the district court that *Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of the misrepresentation about the stock was revealed and the plaintiffs in this case did not so plead." **(App. 6).**

Without waiving their position that *Dura* is not applicable to Petitioners' common law fraud claim as it is a federal securities case decided under the principles of the PSLRA and involved a species of securities claim (i.e. a class action claim based on a fraud-on-the-market theory) where reliance is presumed, rather than a common law fraud case such as this where reliance must be alleged and proved, Petitioners moved for leave to amend their amended complaint to add further allegations of loss causation.

The motion to amend was denied and the district court entered a final judgment dismissing the claims. **(Ap. at 174-178).**

The Petitioners timely appealed the dismissal of their common law fraud claim that had just been upheld. On September 21, 2006 the Court of Appeals affirmed the trial court's dismissal of Petitioner's amended complaint on the basis that loss causation had not been adequately pled as required by *Dura*, notwithstanding the decision of the first panel, that causation had been adequately pled. The panel also affirmed the district court's denial of Petitioners' proposed amendment on the ground that the amendment would be futile. **(App. 12).** The court applied the abuse of

discretion standard in determining whether Petitioners' motion for leave to appeal should have been granted. **(App. 6, 12).**

Thereafter, on October 5, 2006, Petitioner filed a petition for rehearing en banc requesting the full court to decide what appeared on the face to be inconsistent decisions by the respective panels. Petitioners' petition for rehearing en banc was denied by the Court of Appeals on October 18, 2006.

REASONS FOR GRANTING THE PETITION

The Court should grant the writ for certiorari because the decision by the Court of Appeals has expanded this Court's decision last term in *Dura* to apply the pleading requirements of the Private Securities Law Reform Act to a common law fraud claim, which has the effect of federalizing state common law by engrafting the pleading requirements applicable to federal securities cases to state common law claims and in so doing, has eviscerated the state common law remedy in contravention of this Court's decision last term in *Merrill Lynch v. Dabit*, 126 S. Ct. 1503, 1510 (2006) and inadvertently provided the basis for admitted defrauders to avoid liability and leave a defrauded plaintiff without a remedy. The pleading requirements imposed by the Reform Act and the loss causation element of claims based on the fraud-on-the-market theory on their face do not apply to state common law claims. The importance of corporate accountability cannot be overemphasized, especially in today's environment when many corporate executives have participated in fraudulent schemes reaping hundreds of millions of dollars for themselves and wiping out the life savings of its investors. Providing impediments to individual plaintiffs (not class

action plaintiffs) to bringing such actions is the antithesis of an efficient market, serves no legitimate purpose, and can only encourage the greed and corruption to continue.

This Court should also grant the writ as it provides an opportunity to resolve the conflict between the Circuits relating to the standard of review for a denial of a motion for leave to amend on the basis that the proposed amendment is futile. Circuits adhering to the abuse of discretion standard, provide a basis for claims that have legal merit to be dismissed without any effective review, such as occurred here.

I. The Ruling Below Is Contrary To This Court's Opinion In *Dura* And The Securities Litigation Uniform Standards Act

A. This Court's Interpretation Of *Dura*

Respondents claim that the law concerning Virginia common law fraud was changed by this Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005). Respondents claim is remarkable given this Court's decision in *Dura* noted that it granted certiorari in order to resolve the conflict created in the Ninth Circuit's opinion in *Dura*, 339 F.3d 933 (9th Cir. 2003), with the vast weight of authority in other Circuits regarding loss causation as it related to claims brought on the fraud-on-the-market theory under the federal securities laws which are governed by the pleading requirements of the PSLRA. 125 S. Ct. at 1630. This Court recognized that it was making no dramatic changes in the securities law (125 S. Ct. at 1633), and the argument that *Dura* changed the law as it relates to loss causation under the securities laws is inconsistent with the Court's opinion as to what it in fact was intending by its decision.

Both the trial court and the Court of Appeals also ignore that *Dura* was limited to fraud-on-the-market theory of liability. This Court in *Dura*, specifically stated "Normally, in cases such as this one **(i.e., fraud-on-the-market cases)**, an inflated purchase price will not itself constitute or proximately cause the relevant economic loss" (emphasis added). 125 S. Ct. at 1631. Indeed, the question presented in the petition for certiorari filed in *Dura* was "Whether a securities fraud plaintiff involving the fraud-on-the-market theory must demonstrate loss causation by pleading and proving a causal connection between the alleged fraud, and the investment's subsequent decline in price." 2003 U.S. Briefs 932.

In a fraud-on-the-market based claim, a plaintiff merely pleads that he purchased the shares relying on the integrity of the marketplace rather than purchasing the shares because of a specific misrepresentation. *Basic, Inc. v. Levinson*, 480 U.S. 224 (1988). In a fraud-on-the-market case, there is no direct link between the misrepresentation and the loss. Instead, the link is an indirect link, where the misrepresentation affects the market price, which in turn affected the purchaser, who bought the stock relying on an efficient marketplace to have correctly evaluated the price of the security.

In contrast, Petitioners here specifically alleged that they purchased a core position of approximately 690,000 shares and did not claim that the purchase price of those shares was inflated. The artificial inflation occurred on or about the time of the shareholders' meeting in January 2000 and thereafter. There is no basis to exclude the damages suffered by Petitioners in retaining its core position of shares because in 2000 it purchased shares at an inflated price. In other words, even assuming arguendo

that *Dura* controls Petitioners' common law fraud claim, it is only relevant to a small portion of Petitioners' claim and it cannot possibly destroy the vast portion of Petitioners' claim in which there is neither an allegation nor a suggestion that those shares were purchased at an artificially inflated price.

This would indeed be anomalous as this Court recognized in *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 11 (1971), "We believe that § 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws." (Emphasis in original.) And yet, the Fourth Circuit's opinion in *Glaser* would take away a remedy for a face-to-face fraud, which had always been barred by Section 10(b).

Dura, unlike the present case, was a class action. That distinction is important because class actions, under the PSLRA, require even stricter scrutiny. See Section 27(a). Further, reliance per force plays a lesser role in a class action than in a non-class suit where plaintiff is required not only to plead reliance, but to actually prove it. The first panel in its opinion, made it abundantly clear that Petitioner would have to prove at trial his reliance on these alleged misrepresentations **(App. 28-29)**, in contrast to a fraud-on-the-market theory based claim in which liability would be subsumed by a showing that the misrepresentation was material. *Basic, Inc.*, 480 U.S. at 246-47. Requiring a plaintiff class to plead and prove loss causation for fraud-on-the-market claims fills the void created by removing reliance as an element of the claim. This balance protects both the investor and the market. Imposing this

pleading requirement on an individual state common law fraud plaintiff in addition to pleading reliance and proving both reliance and loss causation effectively immunizes the corporate issuers of securities from liability – an outcome certainly not envisioned by this Court in its decision in Dura.

The district court found "controlling authority has since made [the Fourth Circuit's allegedly] contrary decision [in]applicable," the Enzo Respondents suggested to the district court, and the district court found, that "even if the Fourth Circuit's decision is the 'law of the case,' [the] intervening decision by the Supreme Court [in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005)] trumps the Fourth Circuit's decision." **(App. 48).** The rule of law announced in *Dura*, however, was neither new, nor, as set forth in Section D below, either applicable or contrary to this Fourth Circuit's ruling. For this Court made clear that it was correcting the Ninth Circuit's departure from the law existing in other circuits at the time of the decision here, not changing existing law. *Dura*, 125 S. Ct. at 1630 ("Because the Ninth Circuit's views about loss causation differ from those of other Circuits that have considered this issue, we granted [cert]").

B. The Effect Of The Court Of Appeals Decision Is Contrary To The Securities Litigation Uniform Standards Act And *Merrill Lynch v. Dabit*

The district court held that "*Dura*'s loss causation analysis applies because the Supreme Court relied heavily on definitions of loss causation drawn from the torts of misrepresentation and deceit, the very same type of claim alleged here." **(App. 47).** While undoubtedly the causation

requirement in torts of deceit and misrepresentation evolved into the loss causation requirement under the federal securities laws, it does not follow that the common law fraud has evolved into a federal securities claim.

Common law fraud claims have abounded for hundreds of years while private securities claims have a much shorter existence. Indeed, this Court did not formally recognize a private cause of action under Section 10(b) until 1971. *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). In *J.I. Case v. Borak*, 377 U.S. 426 (1964), the Court specifically enumerated the policy reasons for providing a private right of action, "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements." *Id.* at 432. Creating a private cause of action for violations of the federal securities law was a beneficial supplement to the existing remedies under state law. Hence, it was not necessary to develop a federal securities claim to redress this issue, as there were existing state remedies. The rationale, however, is to provide greater access to plaintiffs in the securities area so that they would not be limited to common law fraud claims, which generally required a higher burden of proof and were generally more difficult to litigate from a plaintiff's perspective.

In the 90's, there was a shift in philosophy and Congress believed that there were abuses by certain plaintiffs (specifically class action plaintiffs) in bringing these kinds of claims. As a result, Congress passed the Private Securities Law Reform Act of 1995, which set very strict standards on what a plaintiff must plead and prove in order to

sustain his claim. See *Merrill Lynch v. Dabit*, 126 S. Ct. 1503, 1510 (2006). The PSLRA specifically provided that a plaintiff must plead loss causation. 15 U.S.C. § 78u-4(b), which provides "in any private action arising under this chapter the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." No such provision is contained in Virginia law. In addition, Section 78 u-4(e)(1) provides a limitation on the damages limiting the award to the difference between the purchase or sales price and the mean trading price of the security during the 90 day period beginning on the date that the information concerning the misstatement is the basis for the action, which is disseminated to the market. Likewise, Virginia law does not have such a provision.

The fact that historically the federal securities laws emanated from common law fraud claims does not require the courts to narrow the scope of common law fraud claims so that it mirrors the federal securities claims. In essence, there is no authority to make common law fraud claims superfluous to the federal securities laws.

Last term, this Court addressed these issues in a slightly different context in *Merrill Lynch*. The question presented there was the scope of the Securities Litigation Uniform Standards Act (hereinafter "SLUSA"). This Court made it very clear that Congress did not enact SLUSA with the intent to preempt state law claims alleging fraud in connection with the purchase or sale of securities. This Court stressed SLUSA would not actually prevent any state cause of action "It simply denies plaintiffs the right to use the class action device to vindicate certain claims. The Act does not deny any individual Plaintiff, or indeed

any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist." *Merrill Lynch*, 126 S. Ct. at 1514. As long as the suit was not a class action with more than 50 members, plaintiff's common law state claims would not be federalized into a federal securities claim and would not have to meet the burden of complying with the PSLRA.

Here the Court of Appeals denied the Glaser petitioners their right to enforce Virginia state law common law fraud claims. The Fourth Circuit opinion inadvertently does an end run around this important principle of federalism by morphing the pleading requirements under the PSLRA into a pleading requirement for a single lawsuit brought under state common law. In this case, Petitioners alleged a false statement, known to be false when made, which was material to them and caused them to rely to their detriment and suffer damages as a result thereof. Under any and every common law formulation, that is sufficient to set forth a claim if for no other reason embedded in the claim is an allegation that the misrepresentation was the cause of the damages. **(App. 24).**

The sufficiency of Plaintiff's allegations that his damages were caused by Defendant's misrepresentations is covered by Rule 8 and a plaintiff need not plead more than he was damaged as a result of defendant's wrongful conduct. Requiring a plaintiff to plead more facts to establish that the loss was caused when the marketplace learned of the untruthfulness of the representations is to engraft the pleading requirement which was adopted by Congress as a prerequisite to a plaintiff to utilize a federally created cause of action. Neither Congress nor the federal court has the power or authority to judicially legislate the requirements of state common law fraud

claims. This interpretation is also consistent with this Court's decision in *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005), in which the Court held that the long standing state tort remedy provided a strong presumption against federal preemption of that remedy. Similarly, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), this Court stated "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state law causes of actions." While Congress was free to make loss causation an element that plaintiff must plead at the outset to establish a cause of action upon which relief can be granted, Virginia law only requires as a matter of pleading, causation. The first panel specifically found that Petitioners had set forth all the elements, including damages resulting from Respondent's misconduct. "Under Virginia law, a plaintiff seeking to recover for fraud must allege: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." **(App. 24).** "[T]he plaintiffs sufficiently alleged common law fraud under Virginia law." **(App. 31).**

II. Even Assuming Arguendo Petitioners Were Required To Plead Loss Causation, They Had Done So

The district court held that "to properly plead the element of loss causation in a fraud claim, a plaintiff must allege that the [share] price fell [significantly] after the truth came to light about a misrepresentation. . . ." **(App. at 44; see also App. 37). (Ap. at 212).** It based this conclusion on the following language from *Dura*:

> But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss. If the purchaser sells after the truth makes its way into the market place, an initially inflated purchase price *might* mean a later loss.

(App. at 44). To the contrary, however, even if *Dura* is applicable to a common law fraud claim, this Court did not hold that loss causation in a securities fraud case can only be alleged if the stock price dropped after the truth came to light, but rather was giving an example ("if, say") of circumstances under which misrepresentations that led to inflated share prices would *not* have caused any damages, such as when the purchaser sells "quickly" before the price drops and therefore recoups his investment without a loss. The Supreme Court nowhere intimated that a loss sustained by the stock plummeting back to the value it had before the fraud would not satisfy the pleading requirements, but rather suggested that it would satisfy the pleading requirements unless the plaintiffs had not relied on any misrepresentations in buying the stock and the drop in price was actually due to other market forces.

Moreover, although defendants contend that plaintiffs had already lost everything before the true facts were known, it does not follow that "any drop in the Enzo stock price prior to Plaintiffs' sale of their shares necessarily had nothing to do with the alleged misrepresentations." (Enzo Mem. at 9.) For, as set forth above, the misrepresentations induced the purchases at inflated prices and the market corrected for the misrepresentations after defendants sold massive numbers of shares based on their pump by returning to the price at which the stock had traded for years before and after the misrepresentations. Petitioners' allegations therefore negate the suggestion that independent

market forces such as the bottom falling out of the stock market were responsible for the drop.

In sum, contrary to the Enzo Respondents' suggestion, even if *Dura*'s pronouncements on federal securities fraud issues were relevant to this common law fraud case, "the United States Supreme Court has [*not*] definitively rejected the inflated purchase price theory of causation apparently relied upon by Plaintiffs in this action." (Enzo Mem. at 10.) Instead, it merely said that an allegation of misrepresentations leading to inflated purchase prices *alone* is insufficient to state a claim. Petitioners must, as they have here, *also* allege that they were damaged as a consequence by, for example, buying the stock based on misrepresentations and ultimately selling it at a loss when the market corrected for the misrepresentations. Respondents, as in any state common law fraud case, have the right to defend based on proof which demonstrates that their misrepresentations did not cause Petitioners' losses.

As the court explained in *In Re Parmalat v. Sec. Litig.*, 375 F.Supp. 2d 278, 307 (SDNY 2005) "The true extent of the fraud was not revealed to the public until February – after Parmalat shares were worthless and after the close of the Class Period – is immaterial where, as here, the risk allegedly concealed by defendants materialized during that time and arguably caused the decline in shareholder and bondholder value." The *Parlamat* court relied on the Second Circuit's decision in *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87 (2d Cir. 2001) for the proposition that loss causation can be satisfied if the loss from the misrepresentation was foreseeable.

Finally, while Petitioners alleged that they did not know until March 2001 that the gene therapy did not work, they have also alleged that segments of the market

knew much earlier that, at the very least, the therapy was not as efficacious as represented at the January 2000 shareholders' meeting. For example, the investors knew in April 2000 that three clinics had not opened, which could lead investors to question the January 2000 claims as to the efficaciousness of the therapy. Investors knew in April and every month thereafter that Enzo had not moved to Phase II, institutional investors approached in July 2000 to invest in the private placement were privately made aware of the disconnect between the January representations and the private placement memorandum.

Enzo is simply wrong when it contends that loss causation cannot be pled here because the truth concerning their misstatements was not revealed until after Petitioners sold their stock and, therefore, they could not have been damaged by the drop in price that resulted from the revelation of the truth. To the contrary, although Petitioners were not aware of the false statements until the RAC meeting in March 2001, they have alleged that others did discover or learn the truth and the stock went down prior to March 2001 as a result of that knowledge. For example, in proposed paragraph 143, Petitioners allege:

> While plaintiff Glaser was unaware until he attended the RAC meeting on March 8, 2001, that the gene therapy was unsuccessful, the market was nonetheless aware that the statements that were made at the January 2000 annual shareholders' meeting and elsewhere, which are the crux of plaintiffs' complaint, were exaggerated, if not outright false before March 8, 2001.

Petitioners then go on to allege in paragraphs 144-149 how the stock price dropped as a consequence of massive shorts in the stock by those who had reason to know or learn the

truth after the misrepresentations were made, how the stock price dropped when the promised successes were not achieved, demonstrating that the statements were not true, and sell-offs consequently occurred, and how those with access to the private placement memorandum learned that Enzo's claims had been widely exaggerated and sold their shares, thereby leading to an additional decline in market price.

In short, defendants argue in connection with causation an all-or-nothing theory where the reality of the situation is that there were gradations of knowledge in the investment community which affected the market price of the stock and there is nothing in *Dura* that precludes a plaintiff from a recovery measured from the artificially inflated price to a price that has become less inflated, even if full knowledge concerning the efficacy of the gene therapy was not fully known by the market.

III. The Questions Presented Are Important

The question presented here goes to the very core of our federal system in permitting each state, through its laws, to promote its public policy and to protect its citizenry. Reliance on the enforcement procedures of the Securities Exchange Commission and upon private actions brought under the federal securities laws simply do not work. The resources of the SEC are stretched thin and the obstacles placed before an individual private plaintiff under the PSLRA makes it extremely difficult, if not impossible, to successfully state a cause of action except in the most egregious of circumstances where proof is readily available. As Lord Acton observed, "Power tends to corrupt and absolute power corrupts absolutely." *Letter to Bishop Mandell Creighton* (April 5, 1887). The market has reaped

what it has sown and the changes that have been made in the last decade regarding securities litigation. Enron, WorldComm, and many other massive frauds that have come to light over the last few years may never have occurred if the executives of the company reasonably feared that they could be held accountable for their actions. The Enrons and WorldComms have prospered under a *laissez faire* attitude, which has tilted the scale in favor of the wrongdoer against the rights of the individual victims. There is no question that permitting class action securities claims in order to promote judicial economy led to abuses. The PSLRA and SLUSA were enacted to address those abuses and protect the market and legitimate corporate and public interests. There is no history of abuse in the pursuit of individual private state common law fraud claims and no justification to create extraordinary burdens on a private plaintiff.

The Court of Appeals decision and its application of *Dura* provides a safe harbor for all who want to defraud. According to the Court of Appeals for the Fourth Circuit, it did not matter that Respondents had made these grandiose and false representations relating to their gene therapy and that plaintiffs who had accumulated accounts valued in excess of $100 million lost everything and were forced into bankruptcy. Defendants were absolved from liability because plaintiff's shares were liquidated prior to the falsity of their representations having been publicly disclosed. Liability according to the Court of Appeals for the Fourth Circuit, cannot attach if the market is unaware that the representations were false.

> In other words, so long as the fraud is undisclosed, normal fluctuations in price attendant to any market may have a direct effect on the value of the investor's portfolio, but cannot be said to

> be a 'loss' that is actionable under the federal securities laws, or as here, the common law of Virginia. **(App. 9).**

The clever defendant merely needs to stonewall and deny that the representations that he made were false and no matter how much plaintiff has lost, he cannot recover against defendant because he will be unable to show loss causation. It is simply remarkable that such a result can be countenanced by a Court of Appeals and absolutely astounding that the basis of perpetrating this injustice is laid at the feet of this Court by misapplying this Court's decision in *Dura*.

IV. The Court Of Appeals Applied The Incorrect Standard In Denying Petitioners' Motion For Leave To Amend

The Court of Appeals ruled that the issue of whether the Petitioners should have been permitted leave to amend is a matter within the sound discretion of the trial court. **(App. 4, 12).** Petitioners respectfully submit that when a plaintiff is denied leave to amend on the basis that such an amendment would be futile, the standard of review is *de novo* rather than discretionary. There is a wide divergence in the circuits on this important issue. For example, the Second, Third, Fourth, Fifth, and Seventh Circuits have held that the standard of review on appeal from a denial of leave to amend based on futility is abuse of discretion. In *Ellis v. Chao*, 336 F.3d 114, 126-27 (2d Cir. 2003), the district court denied plaintiff's leave to amend his complaint as futile and stated, "We review the district court's denial for abuse of discretion." See also *Anderson v. Ayling*, 396 F.3d 265 (3d Cir. 2005), *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815 (7th Cir. 1991).

However, the Eighth, Ninth, and Eleventh Circuits have all held that when a plaintiff is denied leave to amend based on the futility of the amendment, the standard of review is *de novo*. In *Lawal v. RTM*, 2006 U.S. App. LEXIS 30856 at *3 (11th Cir. 2006), the Eleventh Circuit stated, "A district court's refusal to grant leave to amend is reviewed for an abuse of discretion, although the underlying legal conclusion of whether a particular amendment to a complaint would be futile is reviewed *de novo*." See also *Strolberg v. Akal Security, Inc.*, 2006 U.S. App. LEXIS 30440 (9th Cir. 2006) and *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748 (8th Cir. 2006).

This Court's ruling in *Foman v. Davis*, 371 U.S. 178 (1962) that amendments should be liberally construed is unduly curtailed by simply providing that the question of whether an amendment should be permitted becomes one of discretion. Since whether the amendment is futile or not is a legal issue, there is no basis to treat the ultimate decision of permitting the amendment to a deferential standard.

Here, Petitioners proposed the following amendments to satisfy the district court's requirement of pleading loss causation:

1. Plaintiffs continued to add to their core position of Enzo, sell puts, and retain their holdings as a direct and proximate result of the misrepresentations that were made at the January 2000 annual shareholders' meeting and elsewhere as set forth above. Plaintiffs did so both by purchasing shares and selling puts. But for the aforesaid representations, plaintiffs would not have continued to purchase Enzo and aggressively sell puts.

2. As a direct and proximate result of plaintiffs' purchasing additional shares of Enzo and the selling of puts after the annual shareholders' meeting, plaintiffs suffered millions of dollars in losses.

3. Alternatively, plaintiffs continued to hold their Enzo shares after the shareholders' meeting and after the stock price soared because plaintiffs believed that the statements that had been made concerning the success of the gene therapy were true. In particular, plaintiff Glaser had been advised by Dennis Roth, an analyst who had interviewed defendant Engelhardt, that Enzo's gene therapy was not efficacious. Upon learning this information from Roth, plaintiff Glaser called Barry Weiner to discuss the matter with him. Weiner advised Glaser that Roth was wrong, that the gene therapy was efficacious, and that the data that Roth had been discussing with Engelhardt was stale and did not reflect the current experience with the gene therapy. Weiner continually assured Glaser that all was well and that Enzo was on schedule or better. Glaser also received comfort from Enzo's press releases indicating that they were going to treat frank AIDS and that the company was unaware of any reason for the decline in the value of its stock price.

4. Plaintiff Glaser, but for the statements made at the January 2000 annual shareholders' meeting and the assurances he obtained from Barry Weiner, would have liquidated his position in Enzo in the same manner as David Russell, also a large shareholder who had received the same information from Mr. Roth. During this period, Morgan Stanley had been urging plaintiffs to liquidate or at least substantially reduce their holdings in Enzo, which plaintiffs resisted doing

because of the statements that were made at the annual shareholders' meeting and elsewhere, coupled with the repeated assurances that he received from Barry Weiner and the press releases.

5. While plaintiff Glaser was unaware until he attended the RAC meeting on March 8, 2001, that the gene therapy was unsuccessful, the market was nonetheless aware that the statements that were made at the January 2000 annual shareholders' meeting and elsewhere, which are the crux of plaintiffs' complaint, were exaggerated, if not outright false before March 8, 2001.

6. During this period in 2000, the short interest in the stock rose to almost 4 million shares, which was an all-time record and a substantial percentage of the float. Certain segments of the market were aware that the gene therapy was not as represented and that commercialization of the therapy would not be in the immediate future or the stock would not have been shorted as aggressively as it was. The shorting of the stock provided downward pressure and deflated Enzo's stock price.

7. The stock peaked in late January 2000, at or about the time of the annual retro-virus conference, because there were rumors that Enzo was going to make further public announcements concerning the successes it had achieved. For example, the stock traded from $42.87 on January 12, 2000, the date of the annual shareholders' meeting, to a high of $139 on January 25, 2000. When the announcement was not made at the retro-virus conference, the stock declined significantly from its all-time high. During February 2000, it traded in a range of $55.50 to $95.50. In March 2000, the stock traded in a range of $63.81 to $104. The market anticipated that the

three clinics would be open by April 2000 and that buoyed the price of the stock as the market in general still believed that Enzo's gene therapy was efficacious. At the end of March and beginning of April 2000, the Enzo stock price declined precipitously. From approximately March 28 to April 15, 2000, the stock dropped from $81 per share to $31.81 per share.

8. Plaintiffs believe that the drop in price was the result of the fact that the insiders sold/transferred 600,000 shares and that the milestone of opening three clinics by April had not occurred, which would cast doubt on Enzo's claims of having "killed the virus" and its claims of efficacy of its gene therapy treatment.

9. The stock resumed its climb from its April lows fueled by rumors that the further announcements of its success would occur at the June 2000 gene therapy conference and the October liver conference. The stock moved from a low of $31 in April 2000 to a high of $75 in July 2000. From late 1999 through early to mid 2000, institutions such as Fidelity began aggressively purchasing Enzo, which demand increased the price of the stock. Fidelity alone had purchased in excess of 1.3 million shares of Enzo.

10. At the time of what became the aborted private placement, Enzo was trading at approximately $70 per share. At or about the very date the private placement was circulated, the stock dropped almost 30% in one afternoon. Plaintiffs believe that the institutions that had been purchasing Enzo on the belief that its gene therapy was successful and that commercialization of its gene therapy was imminent, determined upon reading the private placement memorandum that Enzo's claims had been widely exaggerated and that

information led to a sell-off in Enzo stock. The stock dropped from its July 2000 high of $75 to $35 by October and had a low in December of 2000 of $18.94, which was less than one half of its December 1999 close.

11. By mid to late 2000, Fidelity had completely divested itself of the 1.3 million shares it had purchased providing substantial downward pressure on the stock, further deflating its price. Plaintiffs believe that Fidelity and others recognized that the claims that Enzo had made concerning its gene therapy were either wildly exaggerated or simply false, which led to a substantial market correction in the price of Enzo stock.

12. At all material times, plaintiffs remained shareholders of Enzo even though their holdings had been diminished by margin calls and other forced sales required by Morgan Stanley in policing plaintiffs' accounts.

After remand, the Petitioner's Complaint was dismissed by the trial court. The Court of Appeals sustained the trial court's denial for leave to file an amended complaint, noting that any amendment would be futile. The Court of Appeals' gratuitous comment that Petitioner had 13 months of *unfettered* discovery in the bankruptcy court and four attempts to amend his complaint is simply untrue. (App. p. 11) (Emphasis added). Enzo objected to every attempt by Petitioners to conduct discovery in their bankruptcy proceeding. Some of their objections were sustained and others were rejected. **(Sealed App. 291 ¶ 125).** From any perspective, discovery in the bankruptcy proceeding was contested, time consuming, limited and anything but unfettered. Petitioners respectfully submit that if pleading loss causation is required for a state

common law fraud claim, then the proposed amendments set forth above met that requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LAWRENCE F. GLASER, individually and on behalf of Kimberly, Erin, Hannah and Benjamin Glaser; MAUREEN GLASER, individually and on behalf of Kimberly, Erin, Hannah and Benjamin Glaser,

Plaintiffs-Appellants,

v.

ENZO BIOCHEM, INCORPORATED; HEIMAN GROSS; BARRY WEINER; ELAZAR RABBANI; SHAHRAM RABBANI; JOHN DELUCCA; DEAN ENGELHARDT,

Defendants-Appellees,

and

RICHARD KEATING; DOUG YATES; JOHN DOE, 1-50,

Defendants.

No. 05-1920

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(CA-02-1242)

Argued: May 25, 2006

Decided: September 21, 2006

Before WILKINS, Chief Judge, GREGORY, Circuit Judge, and Joseph F. ANDERSON, Jr., Chief United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge Anderson wrote the opinion, in which Chief Judge Wilkins and Judge Gregory joined.

COUNSEL

ARGUED: Michael Jay Rovell, Chicago, Illinois, for Appellants. Robert Richardson Vieth, COOLEY & GODWARD, L.L.P., Reston, Virginia, for Appellees. **ON BRIEF:** K. Stewart Evans, Jr., William J. Bethune, PEPPER HAMILTON, L.L.P., Washington, D.C., for Appellee Heiman Gross; Donald H. Chase, MORRISON COHEN, L.L.P., New York, New York, for Appellees Enzo Biochem, Incorporated, Barry Weiner, Elazar Rabbani, Shahram Rabbani, John DeLucca, and Dean Engelhardt.

OPINION

ANDERSON, Chief District Judge:

The plaintiffs, Lawrence F. Glaser and his family, appeal the dismissal of their claims for common law fraud against Enzo Biochem, Incorporated ("Enzo") and individual defendants Heiman Gross, Barry Weiner, Elazar Rabbani, Shahram Rabbani, John DeLucca, and Dean Engelhardt. After this Court remanded a portion of the case in an earlier appeal, *Glaser v. Enzo,* No. 03-2188, 2005 WL 647745 (4th Cir. March 21, 2005), the district court granted the motion of defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross ("Moving Defendants") to dismiss the common law fraud claims against them for lack of an actionable statement, as well as the motion to dismiss the common law fraud claims against the remaining defendants because of the decision

of the United States Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336 (2005), which issued subsequent to this Court's remand. The district court also denied plaintiffs' motion to amend their amended complaint. For the reasons that follow, we affirm.

I.

As recounted in the earlier appeal, Enzo is a publicly traded biotechnology company engaged in research and development of treatments to combat the human immunodeficiency virus ("HIV") and other diseases. From 1994 to 2000, Glaser purchased more than one million shares of Enzo stock. According to the plaintiffs' Amended Complaint, Enzo, through press releases and statements made by its officers, exaggerated the preliminary success of its HIV and Hepatitis B therapies, including pre-clinical and clinical trials; its stealth vector; its patent estate; and other commercial arrangements. Plaintiffs claim that the purpose of the alleged fraud and conspiracy among the defendants was to enable the defendants to dump their shares on an unsuspecting marketplace and obtain prices that, had the true facts been known, would have been substantially lower. Plaintiffs claim that defendants' conduct caused plaintiffs' entire position in Enzo – which at one point was in excess of $100 million – to liquidate and thus forced plaintiffs into bankruptcy.

In the first appeal, plaintiffs challenged, inter alia, the district court's dismissal of their common law fraud claim. In reversing that portion of the district court's ruling, we found that plaintiffs had sufficiently alleged common law fraud under Virginia law as to eight misrepresentations made by the following defendants: two statements made

by defendant Engelhardt at the January 12, 2000 shareholders' meeting, three statements made by defendant Weiner at the January 12 meeting, and three statements made by defendant Enzo in various press releases issued after the January 12 meeting.

On remand, defendants moved to dismiss the remaining common law fraud claim on two grounds: first, that this Court had effectively dismissed the conspiracy claims against the Moving Defendants as they did not make any of the eight actionable statements left standing by this Court's prior opinion, and, second, that plaintiffs failed to adequately allege loss causation as *Dura* required. Plaintiffs sought to amend their Amended Complaint to add allegations to their common law fraud claim to satisfy the *Dura* pleading requirements of loss causation. The district court granted defendants' motion to dismiss and denied plaintiffs' motion to amend. The plaintiffs now appeal each of these adverse rulings.

II. Discussion

A. Standard of Review

This Court reviews *de novo* a decision dismissing a complaint for failure to state a claim. *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 334 (4th Cir. 1996). A complaint should not be dismissed unless there is no set of facts on which relief can be granted, with all well-pled allegations of the complaint viewed as true and drawing all reasonable inferences in favor of the plaintiff. *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). The Court reviews a denial of leave to amend the complaint for an

abuse of discretion. *GE Investment Private Placement Partners II v. Parker,* 247 F.3d 543, 548 (4th Cir. 2001).

B. Dismissal of Claims Against Moving Defendants

The district court dismissed the plaintiffs' common law fraud claim against the individual defendants. Under Virginia law, a plaintiff seeking to recover for fraud must allege: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Bank of Montreal v. Signet Bank,* 193 F.3d 818, 826 (4th Cir. 1999) (applying Virginia law); *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.,* 507 S.E.2d 344, 346 (Va. 1998).

The district court dismissed the complaint against the Moving Defendants because they did not make any of the statements this Court found in its prior opinion to be actionable. The plaintiffs argue the district court erred in dismissing the Moving Defendants, contending these defendants conspired with the people who did make the false statements. Accordingly, the plaintiffs assert the dismissal of the Moving Defendants was effectively reversed when this Court reversed the district court's dismissal and remanded plaintiffs' common law fraud claim. We disagree.

Our review of the record reveals that Moving Defendants Elazar and Shahram Rabbani, John DeLucca, and Heiman Gross made none of the statements that this Court upheld as bases for plaintiffs' common law fraud claims. Instead, those statements were made by defendants Engelhardt, Weiner, and in Enzo press releases. Furthermore, this Court previously upheld the district

court's dismissal of plaintiffs' conspiracy to commit securities fraud claims and found no abuse of discretion in the district court's decision to deny leave to amend to plead conspiracy to commit common law fraud. Therefore, the district court properly dismissed the common law fraud claims against the Moving Defendants.

C. Dismissal of Common Law Fraud Claim Under *Dura*

Plaintiffs next challenge the dismissal of their common law fraud claim for failure to satisfy the *Dura* pleading requirements of loss causation. First, the plaintiffs contend that this Court had already specifically held that their common law fraud complaint was legally sufficient and there was no basis for the district court to ignore that ruling. Second, the plaintiffs argue that *Dura* did not change the law considered by this Court, but merely rejected a holding in the Ninth Circuit. Finally, plaintiffs assert they do not rely on the theory of loss causation that was rejected in *Dura*. We find plaintiffs' arguments unpersuasive. Instead, we agree with the district court that *Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed, and the plaintiffs in this case did not so plead. *See* 544 U.S. at 342.

This Court has not previously addressed the adequacy of plaintiffs' loss causation allegations, most significantly because it was not the basis of the district court's original dismissal of the common law fraud claim. Subsequent to this Court's opinion and mandate remanding the action to the district court, the Supreme Court issued its decision in *Dura* which addressed analogous fraud allegations and specifically rejected the inflated purchase price approach

to causation relied upon by plaintiffs in their pleadings. With the benefit of *Dura,* the district court determined that plaintiffs' pleadings of common law fraud failed as a matter of law because plaintiffs were unable to link their losses to the alleged misrepresentations by showing that the Enzo stock price dropped upon revelation of the true state of facts.

The plaintiffs in *Dura* were purchasers of stock in a pharmaceutical company which allegedly made false statements about expected future Food and Drug Administration approval of a new asthmatic spray device resulting in an artificially-inflated stock price. The *Dura* plaintiffs alleged that they purchased the stock at inflated prices and that they suffered resulting damages. *Id.* at 339.

In its analysis, the *Dura* court analogized the federal securities law case there to common-law tort actions for deceit and misrepresentation. *Id.* at 341. The Supreme Court rejected the Ninth Circuit's holding that loss causation is established by showing that "the price on the date of purchase was inflated because of the misrepresentation," *id.* at 342, and concluded that to properly plead loss causation in a fraud claim, a plaintiff must allege that the price fell after the truth came to light about a misrepresentation, and that the plaintiff suffered damages as a result, and even this may not be sufficient to show actual loss:

> For one thing, as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value. Moreover, the logical link between the inflated share

> purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. *But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss.* If the purchaser sells later after the truth makes its way into the market place, an initially inflated purchase price *might* mean a later loss. But that is far from inevitably so. When the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. . . . Other things being equal, the longer the time between purchase and sale, the more likely that this is so, *i.e.,* the more likely that other factors caused the loss.

Id. at 342-343 (emphasis added).

The loss causation principle endorsed by *Dura* can be illustrated by a simple hypothetical: Assume an investor purchased 100 shares of Enzo for $12 per share on January 12, 2000, after the alleged misrepresentations were made. If the market had known the truth about the science, instead of trading for $12 per share, the stock would have traded for only $1 per share.

Plaintiffs in this case would have stopped the analysis there, contending that, on the very day of purchase, the investor has suffered a loss of $1,100 – the difference between the price paid ($1,200) and the price that *would have been paid* ($100) had the true facts been known. This

analysis ignores the fact that the true facts are not yet known and the hypothetical investor has not yet suffered a loss.*

If the stock later drops, as a result of normal market fluctuations, to $6 per share (again assuming the fraud has not yet been disclosed), then the investor owns stock worth only one-half of what was paid for it. If he sells at this point, he has lost $600 of his initial $1,200 investment, to be sure, but this loss was not *caused by* the fraudulent conduct, because, under the hypothetical, the market is still unaware of the misrepresentations.

It is only after the fraudulent conduct is disclosed to the investing public, followed by a drop in the value of the stock, that the hypothetical investor has suffered a "loss" that is actionable after the Supreme Court's decision in *Dura.* In other words, so long as the fraud is undisclosed, normal fluctuations in price attendant to any market may have a direct effect on the value of the investor's portfolio, but cannot be said to be a "loss" that is actionable under the federal securities laws, or as here, the common law of Virginia.

In *Dura,* the Supreme Court swept away precedent holding that it is enough to show causation if the alleged misrepresentation "touches upon" the economic loss. *Id.* at 343. "To 'touch upon' a loss is not to *cause* a loss, and it is the latter that the law requires." *Id.* (emphasis in original). A higher purchase price may lead to a "future loss"

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* If one month later, with the fraud still undisclosed to the market, the Enzo stock climbs to $16 per share, then the hypothetical investor now owns stock worth $400 more than was paid for it, yet has still suffered a $1,100 "loss" under plaintiffs' theory of loss causation.

and may be a "necessary condition of any such loss," the Court said, but it does not by itself show loss causation. *Id.*

Dura makes clear that plaintiffs' damages theory – one that relies on the inflated purchase price theory of causation – cannot be sustained. While plaintiffs repeat throughout their complaint that they were "fraudulently induced to invest in and retain common shares of Enzo at artificially inflated prices" (A. 271, 272, 277, 287, and 294; Complaint at ¶¶ 64, 70, 84, 114 and 135), they make no effort to link the drop in stock price to any revelation of the true facts behind any alleged misrepresentations by defendants, let alone to one of the eight actionable alleged misrepresentations remaining after this Court's prior opinion. Plaintiffs must have pled an actual causal connection between the alleged misrepresentations and a subsequent decline in Enzo's stock. Plaintiffs' failure to do so is fatal to their common law fraud claim.

In fact, plaintiffs' own admissions establish that any decline they experienced is unrelated to the defendants' alleged misrepresentations. Plaintiffs concede in their complaint that the alleged truth about Enzo's science was not publicly revealed until a Recombinant Advisory Committee ("RAC") meeting on March 8, 2001. (A. at 286, 289; Complaint, ¶ 109 and 119). By that time, however, plaintiffs had already sold all their Enzo shares and filed for bankruptcy protection. (A. at 259; Complaint, ¶ 12; A.44). Consequently, any declines in the price of Enzo stock that occurred before that date must have been the result of market factors or other factors, not the revelation of the alleged truth relating to any of the eight alleged misrepresentations by the defendants. Apart from the reference to the RAC meeting, plaintiffs do not provide any indication as to when or how the truth became known to them with

respect to any of the eight alleged misrepresentations this Court identified.

Finally, the Court finds unpersuasive plaintiffs' attempts to distinguish *Dura* from the instant case. Although plaintiffs correctly note that *Dura* is a class action and did not decide Virginia law or any common law fraud claim, the Supreme Court in *Dura* extensively discussed the requirements of loss causation at common law and specifically articulated the causation pleading requirements for a fraud claim. The Court finds nothing in the *Dura* court's analysis of the common law loss causation requirements that justifies a different standard for plaintiffs' common law fraud claim under Virginia law.

In light of the intervening precedent provided by *Dura,* the Court finds that plaintiffs do not properly allege loss causation, and that the district court did not err in dismissing plaintiffs' common law fraud claims.

D. Denial of Motion to Amend Complaint

Next, the plaintiffs argue that they should have been granted leave to amend their Amended Complaint. Although leave to amend should "be freely given when justice so requires," Fed. R. Civ. P. 15(a), the district court may deny leave to amend for reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." *Foman v. Davis,* 371 U.S. 178, 182 (1962). Plaintiffs had an unprecedented thirteen months of unilateral pre-complaint discovery under Bankruptcy Rule 2004 and had already set forth four iterations of their

complaint. We conclude that the district court did not abuse its discretion in ruling that the plaintiffs' many opportunities to present their claim warranted denial of the motion to amend.

E. Abandonment of Motion for Reconsideration

Finally, plaintiffs indicated in their Notice of Appeal that they were appealing the denial of their motion for reconsideration pursuant to Rule 59(e). However, because plaintiffs fail to address their motion for reconsideration in their appellate brief, they are deemed to have abandoned it.

III.

The district court properly dismissed the plaintiffs' common law fraud claim and did not err in denying the plaintiffs leave to amend their complaint.

AFFIRMED

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2188

LAWRENCE F. GLASER; MAUREEN GLASER, individually and on behalf of Kimberly, Erin, Hannah, and Benjamin Glaser,

Plaintiffs-Appellants,

versus

ENZO BIOCHEM, INCORPORATED; HEIMAN GROSS; BARRY WEINER; ELAZAR RABBANI; SHARIM RABBANI; JOHN DELUCCA; DEAN ENGELHARDT; JOHN DOE 1-50,

Defendants-Appellees,

and

RICHARD KEATING; DOUG YATES,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-02-1242-A)

Argued: September 30, 2004 Decided: March 21, 2005

Before WILKINSON, GREGORY, and SHEDD, Circuit Judges.

Affirmed in part, reversed in part, and remanded by unpublished opinion. Judge Shedd wrote the opinion, in which Judge Gregory joined. Judge Wilkinson wrote an opinion concurring in part and dissenting in part.

ARGUED: Michael J. Rovell, Chicago, Illinois, for Appellants. Donald Howard Chase, MORRISON, COHEN, SINGER & WEINSTEIN, New York, New York, for Appellees. **ON BRIEF:** Lisa I. Fair, LAW OFFICES OF MICHAEL J. ROVELL, Chartered, Chicago, Illinois, for Appellants. Robert R. Vieth, Patricia T. Giles, COOLEY GODWARD, L.L.P., Reston, Virginia; David A. Piedra, MORRISON, COHEN, SINGER & WEINSTEIN, New York, New York, for Appellees Enzo Biochem, Incorporated, Barry Weiner, Elazar Rabbani, Sharim Rabbani, John DeLucca, and Dean Englehardt. K. Stewart Evans, Jr., PEPPER HAMILTON, L.L.P., Washington, D.C., for Appellee Heiman Gross.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

SHEDD, Circuit Judge:

The plaintiffs, Lawrence F. Glaser and his family, appeal the dismissal of their claims for federal securities fraud, conspiracy, and common law fraud against Enzo Biochem, Inc. ("Enzo") and individual defendants Barry Weiner, Elazar Rabbani, Shahram Rabbani, Dean Engelhardt, John DeLucca, and Heimon [sic] Gross. After denying the plaintiffs leave to amend their complaint, the district court dismissed the federal securities fraud claim based on the applicable statute of limitations and dismissed the

remaining claims for failure to state a claim upon which relief could be granted. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

I.

Enzo is a publicly traded biotechnology company engaged in research and development of treatments to combat the human immunodeficiency virus ("HIV") and other diseases. During the period from 1994 to 2000, Glaser purchased more than one million shares of Enzo stock. According to the plaintiffs' amended complaint, Enzo, through press releases and statements made by its officers, exaggerated the preliminary success of a new HIV treatment in 2000 and misled investors concerning the prospects for marketing that treatment. As a result, Glaser continued to purchase Enzo stock at a time when Enzo's officers and directors were selling their stock at inflated prices. After Enzo's stock price dropped precipitously in the spring of 2000, Glaser was left holding more than one million shares, many of which had been purchased on margin. Glaser and his wife were forced into bankruptcy.[1]

The plaintiffs specifically complain about statements made by Enzo officers during the January 12, 2000, annual shareholders' meeting. At that meeting, Enzo manager Dean Engelhardt announced that Enzo had

[1] Because we are reviewing a Rule 12(b)(6) dismissal, we "must take all well-pleaded material allegations of the [amended] complaint as admitted and view them in the light most favorable to the plaintiff." *De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991).

developed a new treatment to combat HIV. According to Engelhardt, this new treatment was like a "roach motel," where "the virus goes in but does not come out." J.A. 267. Engelhardt stated that although the Food and Drug Administration ("FDA") would not allow him to say that Enzo had cured AIDS, Enzo's new treatment "works" and it kills the virus. J.A. 267. The amended complaint alleges that these statements were false because preliminary trials had not, in fact, yielded results that would satisfy the FDA's efficacy requirements for such a treatment.

During the same January 12 meeting, Enzo's president, Barry Weiner, reported that Enzo planned to open three more clinics by the end of the fiscal year to treat HIV and AIDS patients. J.A. 267. Each clinic would be able to treat 9,500 patients at a charge of $30,000 per patient. The amended complaint alleges that this representation was false because Enzo did not have permission from the FDA to open any new clinics, nor had Enzo even sought such permission. Weiner also stated that Enzo had submitted its Phase I trial data to the FDA and that the company was awaiting approval to proceed to Phase II trials.[2] J.A. 268. In fact, Enzo did not even have Phase I data in hand that it could submit to the FDA at that time.

Weiner made further representations concerning the so-called HGTV-43 vector, a key component of a new gene therapy developed by Enzo. In a process called transduction, the HGTV-43 vector would deliver certain genes to

[2] Clinical trials for new treatments are conducted in phases. Phase I trials involve a smaller number of patients and primarily assess the safety and preliminary efficacy of the treatment. Phase II trials involve a larger number of patients and are focused on the ultimate efficacy of the treatment.

human cells. With this new gene, these cells were engineered to enhance immune responses. Weiner stated at the January 12 meeting that Enzo scientists had been able to reduce the time period required for successful transduction from a period of up to three months to a period of only eighteen hours; that HGTV-43 was able to achieve levels of stable transduction to patients' non-growing blood stem cells greater than 30%; and that the HGTV-43 vector was ready for commercialization. J.A. 268-69. In a press release regarding Enzo's gene therapy and the HGTV-43 vector, Enzo also stated that it was exploring expansion of its clinical trials. J.A. 269. Weiner failed to mention, however, that Enzo had modified its transduction protocol due to the absence of any positive data from initial research or that this lack of positive data had slowed down the development of Enzo's gene therapy and delayed clinical trials. Despite Weiner's assurance that the HGTV-43 vector was ready for commercialization, Enzo had not marketed that product by the time the plaintiffs filed their complaint.

Although share prices for Enzo usually fluctuated by approximately $1 per share to $3 per share after annual meetings and trading volumes average only two million shares, in the eight trading days after the January 12 meeting Enzo's stock price soared $90 per share – from $43 to $133 – at a trading volume of more than thirteen million shares.

Within a few months after the January 12 meeting, one Enzo director sold all of his holdings, valued at approximately $2 million. Three of Enzo's five directors sold a total of 600,000 shares at $81 per share, and Engelhardt, who made several of the statements at issue in this case, sold 5,000 shares at $70 per share. Enzo's stock price

began to decline immediately, and within two weeks it was down to $35 per share.

In response to this devaluing of the stock, Enzo managers issued a press release assuring investors that "[t]he recent activity of the stock merely mirrors the general weakness that has affected the entire biotech industry and in no way reflects Enzo's intrinsic value." J.A. 274. This press release further stated that a clinical study at the University of California was moving toward its final stages; HGTV-43 had successfully delivered certain genes to blood stem cells outside the human body; following transduction and infusion into patients, the genetically engineered cells continue to survive and behave in a manner consistent with the goals of the treatment; an abstract concerning the therapy had been accepted for presentation to the American Society of Gene Therapy in June 2000; Enzo knew of no other therapy that had achieved the results that Enzo's gene therapy achieved; and plans for Phase II clinical studies were proceeding. J.A. 274-75. This press release misrepresented key facts concerning Enzo's gene therapy. Enzo's trials had not yielded particularly positive results, and in some cases produced negative results; Enzo failed to mention that the data it collected was based on only five patients; and Enzo had not applied for Phase II approval, nor did it have a schedule in place for Phase II testing.

Once its stock price dropped to $35, Enzo issued another press release. According to this release, all remained well with Enzo, the ongoing clinical trials were on schedule, and Enzo had no explanation for the collapse in the stock price. J.A. 277. These statements were false in that Enzo had no schedule in place for the ongoing clinical trials, and Enzo did have at least a partial explanation for

the drop in stock price, *i.e.*, the transfer of 600,000 shares by top-level managers.

In October 2000, Enzo issued a press release reporting that "new data on the first individual treated in the Phase I clinical trial of HGTV-43, the company's HIV-1 gene medicine product, show that after nine and one-half months Enzo engineered cells have successfully engrafted the patient's bone marrow and were spawning new . . . cells designed to fight the virus." J.A. 285-86. Contrary to this statement, Enzo disclosed data in March 2001 showing that engraftment had actually failed.

The devaluation of Enzo stock resulted in significant losses for Glaser. By April 2000, Glaser held more than one million shares of Enzo stock, and he was forced to liquidate these holdings in order to cover debts for shares purchased on margin. Glaser and his wife ultimately filed for bankruptcy protection.

During the course of his bankruptcy proceeding, Glaser came to believe that Enzo was involved in a "massive securities fraud" and sought discovery from Enzo concerning that fraud. J.A. 740A. The bankruptcy court granted Glaser's motion for discovery. In March 2002 – more than a year after filing his motion for discovery in the bankruptcy court – Glaser filed a complaint alleging federal securities fraud and common law fraud against Enzo. Glaser voluntarily dismissed this initial complaint. In August 2003, Glaser and his family initiated this lawsuit by filing a new complaint alleging violations of federal securities laws, civil conspiracy, and common law fraud.

The district court dismissed the federal securities fraud claim on the ground that the applicable one-year

statute of limitations had run before the complaint was filed. The district court then dismissed the plaintiffs' conspiracy claim as a matter of law, ruling that federal securities laws do not contemplate liability for conspiracy just as they do not for aiding and abetting. Finally, the district court dismissed the plaintiffs' common law fraud claim on the grounds that the plaintiffs failed to allege (1) that the specified misrepresentations concerned material facts or (2) that they actually relied on any such misrepresentations. Although the plaintiffs sought leave to amend their complaint further, the district court ruled that any repleading would be futile and denied the request. The plaintiffs now appeal each of these adverse rulings.

II.

The district court dismissed the plaintiffs' federal securities fraud claim against Enzo based on the statute of limitations. The plaintiffs argue that their claim is timely under the one-year statute of limitations provided in the Securities Exchange Act. Even if their claim is not timely under the Securities Exchange Act, the plaintiffs contend that it is timely under the Sarbanes-Oxley Act.

A.

The statute of limitations for a securities fraud claim under the Securities Exchange Act is one year, and it begins to run when the plaintiff is put on inquiry notice of the facts constituting the alleged violation. 15 U.S.C. § 78i(e); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 363 (1991). A plaintiff's awareness of the possibility of fraud, not complete exposure of the fraud, triggers inquiry notice. *Brumbaugh v. Princeton Partners,* 985 F.2d

157, 162 (4th Cir. 1993). "Merely bringing suit after the scheme has been laid bare . . . will not satisfy the requirements of due diligence when there have been prior warnings that something was amiss." *Id.* Where the underlying facts are undisputed, the question whether the plaintiffs were on inquiry notice may be decided as a matter of law. *Id.* We review *de novo* the district court's ruling that the plaintiffs filed this lawsuit more than one year after being put on inquiry notice of possible fraud. *Franks v. Ross,* 313 F.3d 184, 192 (4th Cir. 2002).

Glaser was on inquiry notice as early as February 7, 2001, when he sought discovery from Enzo in the bankruptcy court. Glaser explained to the bankruptcy court that he was seeking discovery because he had *already* "gathered evidence to suggest a massive securities fraud and the manipulation of Enzo stock both inside and outside the company, the exact scope of which is presently unknown." J.A. 740A. Indeed, the amended complaint filed in this case states that the plaintiffs "sought to substantiate their suspicions concerning their belief that securities fraud had been committed by using Bankruptcy Rule 2004," which governs discovery. J.A. 291. Thus, by the time Glaser filed his motion for discovery on February 7, he was aware of "evidence of the possibility of fraud," and the limitations period began to run. *Brumbaugh,* 985 F.2d at 162. The plaintiffs did not file this lawsuit, however, until August 2002, more than one year after the date on which they were put on inquiry notice of possible securities fraud.[3]

[3] The plaintiffs argue that their failure to file within one year of inquiry notice should be excused because Enzo "stonewalled and obstructed their discovery" during the period from May 2001 to

(Continued on following page)

B.

The plaintiffs seek to take advantage of the two-year limitations period provided by § 804(a) of the Sarbanes-Oxley Act, which took effect on July 30, 2003. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 804 (2002) ("Sarbanes-Oxley"). The plaintiffs filed their original complaint prior to the enactment of Sarbanes-Oxley but voluntarily dismissed that action. They filed the present complaint after the enactment of Sarbanes-Oxley in an attempt to take advantage of the extended limitations period.

The plaintiffs' refiling after Sarbanes-Oxley took effect did not revive any claim that was otherwise barred by the statute of limitations. As the Supreme Court has noted, "extending a statute of limitations after the pre-existing period of limitations has expired" essentially creates a new cause of action by reviving an otherwise "moribund cause of action." *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 950 (1997); *accord In re Enterprise Mortgage,* ___ F.3d ___, 2004 WL 2785776, at *4; *Chenault v. United States Postal Serv.,* 37 F.3d 535, 539 (9th Cir. 1994). Section 804(c) of Sarbanes-Oxley, however expressly indicates an intention not to create any new causes of action. Although § 804(b) states that the new two-year statute of limitations "shall apply to all proceedings . . . that are commenced on or after the date of enactment of [Sarbanes-Oxley]," this language does not clearly express

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February 2003. This argument is meritless. As we have explained, the plaintiffs had sufficient knowledge on February 7, 2001, to be on inquiry notice. Even if Enzo's subsequent conduct in discovery delayed the plaintiffs' full understanding of the alleged fraud, it did not prevent the plaintiffs from filing a complaint within one year of inquiry notice.

an intention to revive otherwise stale claims. *See In re Enterprise Mortgage Acceptance Co., LLC, Sec. Litig.*, ___ F.3d ___, 2004 WL 2785776, at *3-*4 (2d Cir. Dec. 6, 2004). We agree with the district court that Sarbanes-Oxley does not revive the plaintiffs' otherwise untimely securities fraud claim.

III.

The plaintiffs next argue that the district court erred in dismissing their conspiracy claim against the individual defendants. The Supreme Court held in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), that there is no civil liability for aiding and abetting a violation of § 10(b). *Id.* at 177. "[T]he statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act. The proscription does not include giving aid to a person who commits a manipulative or deceptive act." *Id.* (internal citations omitted). Following *Central Bank,* we have stated that "a misrepresentation must be directly attributable to [the defendant] and not to some other person." *Gariety v. Grant Thornton, LLP,* 368 F.3d 356, 369 (4th Cir. 2004).

The rationale of *Central Bank* with respect to aiding and abetting applies equally to civil conspiracy. *See* 511 U.S. at 200 n.12 (Stevens, J., dissenting) (stating that "[t]he Court's rationale would sweep away the decisions recognizing that a defendant may be found liable in a private action for *conspiring* to violate § 10(b) and Rule 10b-5"). The statute itself makes no mention of liability for conspiracy, and recognizing such liability would allow plaintiffs to "circumvent the reliance requirement," a key limitation on securities fraud claims. *Id.* at 180. Thus, we

conclude that there can be no civil liability for conspiracy to commit securities fraud. *Accord Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin,* 135 F.3d 837, 841 (2d Cir. 1998); *In re GlenFed, Inc., Sec. Litig.,* 60 F.3d 591, 592 (9th Cir. 1995).

Our conclusion is not altered by the post-*Central Bank* enactment of 15 U.S.C. § 78t(e), which authorizes *criminal* prosecution of persons who aid and abet securities law violations. Nothing in this provision creates a *private* right of action for aiding and abetting. *See Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1205 n.6 (11th Cir. 2001); *Wright v. Ernst & Young LLP,* 152 F.3d 169, 176 (2d Cir. 1998). In sum, the district court properly followed the reasoning of *Central Bank* and dismissed the plaintiffs' conspiracy claims as a matter of law.

IV.

The plaintiffs next challenge the dismissal of their common law fraud claim. Under Virginia law, a plaintiff seeking to recover for fraud must allege: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled. *Bank of Montreal v. Signet Bank,* 193 F.3d 818, 826 (4th Cir. 1999) (applying Virginia law); *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.,* 507 S.E.2d 344, 346 (Va. 1998).

At issue in this appeal are twelve alleged misrepresentations concerning Enzo's development of a new HIV treatment and gene therapy. The first category of misrepresentations includes statements made by Engelhardt at the January 12 shareholders meeting:

- "It works, they both work," referring to Enzo's gene therapy treatments for HIV and Hepatitis B.
- The "virus goes in but does not come out," and Enzo has killed the virus.

The second category of misrepresentations include Enzo president Weiner's statements at the January 12 meeting:

- Enzo would be opening three more clinics to treat HIV/AIDS patients by the end of fiscal year 2000.
- Enzo had submitted Phase I data to the FDA and was awaiting Phase II approval.
- Enzo scientists had reduced the time required for HGTV-43 transduction from up to three months to eighteen hours.
- The HGTV-43 vector achieves levels of stable transduction greater than 30%.
- The HGTV-43 vector was ready for commercialization.

The final category of statements consists of statements made by Enzo in various press releases issued after the January 12 meeting:

- Enzo was exploring expansion of the trials for its gene therapy.
- The University of California clinical study was moving to its final stages, an abstract was to be presented to the American Society of Gene Therapy in June 2000, Enzo knew of no other system that achieved the results that its gene therapy had achieved, and plans for Phase II trials were proceeding.

- The HGTV-43 vector successfully delivered certain genes to blood stem cells and engineered cells continued to survive after transduction.
- All remained well and on schedule.
- Data from the first person treated in the Phase I trial of HGTV-43 showed successful engraftment of engineered cells into the patient's bone marrow.

Accepting the material allegations of the amended complaint as admitted and viewing them in the light most favorable to the plaintiffs, *DeSole,* 947 F.2d at 1171, these representations were false. Nevertheless, the district court dismissed the plaintiffs' fraud claim on the grounds that (1) none of these misrepresentations concerned a material fact, and (2) the plaintiffs had failed to allege that they reasonably relied on these misrepresentations. We disagree.

A.

Under Virginia law, recovery for fraud requires proof that the fact misrepresented be material and substantially affect the interests of the plaintiff. *J.E. Robert Co. v. J. Robert Co., Inc. of Va.,* 343 S.E.2d 350, 345 (Va. 1986) (citing *Packard Norfolk, Inc. v. Miller,* 95 S.E.2d 207, 211 (Va. 1956)). A fact is material if it "influences a person to enter into a contract," or if it "deceives him and induces him to act," or if "without it the transaction would not have occurred." *Packard Norfolk,* 95 S.E.2d at 211-12. Unfulfilled promises or statements as to future events typically do not constitute material facts that will support a fraud claim, and "[s]tatements which are vague and

indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing." *Tate v. Colony House Builders, Inc.,* 508 S.E.2d 597, 599 (Va. 1999). Similarly, "commendatory statements, trade talk, or puffing, do not constitute fraud because statements of this nature are generally regarded as mere expressions of opinion." *Lambert v. Downtown Garage, Inc.,* 553 S.E.2d 714, 717 (Va. 2001).

There can be no doubt that the efficacy of Enzo's new HIV treatment – including both the direct treatment and the gene therapy – is a material fact for Enzo investors. The fact that Enzo's treatment works or does not work would be important to any investor's decisionmaking. Likewise, the progress of clinical trials for Enzo's new treatment would be an important fact to consider in deciding whether to buy or sell Enzo shares. Thus, all statements concerning the efficacy of Enzo's treatment or the actual progress of clinical trials satisfy the materiality requirement. *See Packard Norfolk,* 95 S.E.2d at 211-12.

By contrast, Weiner's statements that (1) Enzo would open three new clinics within the fiscal year and (2) the HGTV-43 vector was ready for commercialization are not actionable because they amount to unfulfilled promises or statements as to future events. *See Tate,* 508 S.E.2d at 599. The statement in a press release that "all remained well" at Enzo is vague and indefinite, a commendatory statement, or puffery that cannot give rise to an actionable fraud claim. *See Lambert,* 553 S.E.2d at 717; *Tate,* 508 S.E.2d at 599.[4]

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[4] As an additional ground for dismissal, we conclude that the plaintiffs' allegations with respect to Weiner's statements that (1) Enzo

(Continued on following page)

B.

"In order to prove reliance, a plaintiff must demonstrate that its reliance upon the [defendant's] representation was reasonable and justified." *Hitachi Credit Am. Corp. v. Signet Bank,* 166 F.3d 614, 629 (4th Cir. 1999) (applying Virginia law) (internal quotations omitted); *see also Bank of Montreal,* 193 F.3d at 827 (stating that "[i]n all cases of fraud [under Virginia law] the plaintiff must prove that it acted to its detriment in actual and justifiable reliance on the defendant's misrepresentation (or on the assumption that the concealed fact does not exist)"). With respect to representations concerning concrete facts, we have noted that "[t]he touchstone of reasonableness is prudent investigation," and a plaintiff cannot claim to reasonably rely upon a misrepresentation when he "makes a partial inquiry, with full opportunity of complete investigation, and elects to act upon the knowledge obtained from the partial inquiry." *Hitachi Credit,* 166 F.3d at 629 (citing *Harris v. Dunham,* 127 S.E.2d 65, 71-72 (Va. 1962)).

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would open three new clinics to treat HIV/AIDS patients within the fiscal year and (2) the HGTV-43 vector was ready for commercialization, as well as the statement in a press release that Enzo was exploring expansion of its clinical trials, are allegations of "fraud by hindsight." *See Hillson Partners Ltd. P'ship v. Adage, Inc.,* 42 F.3d 204, 209 (4th Cir. 1994) ("Where fraudulent projections are alleged, the plaintiff must . . . identify in the complaint with specificity some reason why the discrepancy between a company's optimistic projections and its subsequently disappointing results is attributable to fraud. . . . Mere allegations of 'fraud by hindsight' will not satisfy the requirements of Rule 9(b)."). The plaintiffs alleged simply that (1) Enzo did not, in fact, open three new clinics, (2) the HGTV-43 vector was not, in fact, commercialized, and (3) the clinical trials were not, in fact, expanded. The plaintiffs did not allege that these statements were known to be false when made.

The plaintiffs alleged that they retained and continued to purchase Enzo stock in reliance on the good news coming from Engelhardt, Weiner, and the various press releases touting the new HIV treatment's preliminary success. J.A. 262, 270, 271, 277, 287, 293, 294. The district court ruled, however, that the plaintiffs could not have reasonably relied upon these misrepresentations because Enzo's Form 10-K contained a "disclaimer" that should have put the plaintiffs on notice that Phase I trials did not actually test the efficacy of Enzo's treatment.[5]

We disagree. The Form 10-K states that "Phase I trials, concerned primarily with the safety and *preliminary effectiveness of the drugs,* involve fewer than 100 subjects. Phase II trials normally involve a few hundred patients and are designed primarily to demonstrate effectiveness in treating or diagnosing the disease. . . . " J.A. 696 (emphasis added). This "disclaimer" actually suggests that the Phase I trials of Enzo's HIV treatment *did* test the efficacy of that treatment, if only to a preliminary degree, and the district court's assertion that these trials "merely tested whether the drug was safe in order to proceed to Phase II," J.A. 48, is simply unsupported. Thus, we cannot say, for purposes of a motion to dismiss, that the 'plaintiffs' alleged reliance upon the various misrepresentations was unreasonable or unjustified as a matter of law.

[5] The district court discussed the Form 10-K in its analysis of materiality under the federal securities laws. Under Virginia law, the district court's concern about the Form 10-K is more appropriately addressed as a matter of reliance rather than materiality.

V.

Finally, the plaintiffs argue that they should have been granted leave to amend their complaint. We review the district court's decision to deny the plaintiffs' motion to amend for abuse of discretion. *Foman v. Davis,* 371 U.S. 178, 182 (1962); *GE Inv. Private Placement Partners II v. Parker,* 247 F.3d 543, 548 (4th Cir. 2001). Although leave to amend should "be freely given when justice so requires," Fed. R. Civ. P. 15(a), the district court may deny leave to amend for reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." *Foman,* 371 U.S. at 182. Because we conclude that the federal securities fraud and conspiracy claims were barred as a matter of law, we agree with the district court that any amendment as to these claims would be futile. To the extent that the plaintiffs argue that they should have been permitted to amend their complaint to include a claim for conspiracy to commit common law fraud, we conclude that the district court did not abuse its discretion in ruling that the plaintiffs' "many opportunities . . . to present their claim" warranted denial of the motion to amend. *See Foman,* 371 U.S. at 182 (recognizing that leave to amend may be denied because of "repeated failure to cure deficiencies by amendments previously allowed"). As the plaintiffs have adequately alleged a claim for common law fraud, amendment of perceived deficiencies in that claim is unnecessary. Of course, we do not foreclose any future amendments that may be appropriate under Fed. R. Civ. P. 15(a).

VI.

The district court properly dismissed the plaintiffs' federal securities fraud and conspiracy claims as a matter of law. Because the plaintiffs sufficiently alleged common law fraud under Virginia law, however, we reverse the district court's dismissal of that claim and remand the case for further proceedings consistent with this opinion.[6]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

WILKINSON, Circuit Judge, concurring in part and dissenting in part:

I concur in much of the majority opinion. The federal claims were properly dismissed as time-barred, and the conspiracy claims were properly dismissed as well. But as to the Virginia common law fraud claims, I do not believe that two of the eight remaining statements are actionable because they are too general. Specifically, representations that "it works, they both work," and that the "virus goes in but does not come out," seem far too brief and too general to state a claim in fraud.

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[6] In sum, only eight of the twelve identified misrepresentations remain for consideration on remand. The statements concerning the opening of new clinics, the readiness of HGTV-43 for commercialization, and Enzo's exploring expansion of clinical trials, as well as the statement that all remained well at Enzo despite the drop in stock price, were properly dismissed as bases for the plaintiffs' common law fraud claim.

All of this is a matter of Virginia law. Nowhere has the Virginia Supreme Court come close to saying that statements of this general a nature present a viable basis for a fraud claim. Quite the opposite: the court has expressly rejected claims predicated on expressions of opinion, unfulfilled promises, statements as to future events, puffing, "dealer talk," or "booster statements." The Virginia Supreme Court has repeated that:

> [i]t is well settled that a misrepresentation . . . must be of an existing fact, and not the mere expression of an opinion. The mere expression of an opinion, however strong and positive the language may be, is no fraud. Such statements are not fraudulent in law, because . . . they do not ordinarily deceive or mislead. Statements which are vague and indefinite in their nature and terms, or are merely loose, conjectural or exaggerated, go for nothing, though they may not be true, for a man is not justified in placing reliance upon them.

Mortarino v. Consultant Eng'g Servs., Inc., 467 S.E.2d 778, 781 (Va. 1996) (quoting *Saxby v. So. Land Co.*, 63 S.E. 423, 424 (Va. 1909)). While the majority acknowledges that unfulfilled promises or future statements cannot be actionable, the Virginia Supreme Court has added that neither "can 'booster' statements of enthusiastic agents be depended upon. They are to be expected." *King v. Commercial Fin. Co.*, 175 S.E. 733, 736 (Va. 1934) (internal citation omitted).

There is a reason for this reluctance to allow puffing, generalities, opinions, or merchant talk to form the basis for a foray into court. We live in a free enterprise system in which it is almost inescapable that people will puff their

wares. One cannot, and the law does not, expect companies to disown their own products. Any reasonable investor, therefore, treats such statements with a healthy degree of skepticism. The law has never protected those who do not. *See Bank of Montreal v. Signet Bank,* 193 F.3d 818, 827 (4th Cir. 1999) (collecting Virginia cases).

This is one reason that the statements at issue are not actionable, and this reason is further connected with the reliance element of common law fraud. "[O]ne who seeks to hold another in fraud must clearly show that he has relied upon the acts and statements of the other." *Harris v. Dunham,* 127 S.E.2d 65, 70 (Va. 1962). Virginia law has long placed investors at their peril when they incautiously rely on puffing or "booster" statements. In *Akers v. Radford State Bank,* 149 S.E. 528 (Va. 1929), the corporation's representative had stated that "not a cent of the [stock's] subscribers' money would be spent" on a railroad until a contractor gave bond and let the railroad. *Id.* at 531. Appellants alleged that this induced them to subscribe to the stock, but the Virginia Supreme Court rejected the claim, because appellants did not "have any right to rely upon these statements . . . [which were] made at a public booster meeting" held to secure stock subscriptions. *Id.*

Glaser's claim similarly lacks merit. He has shown great familiarity with Enzo's business yet relied recklessly on booster statements and puffing. The record discloses an astonishing history of day-trading by buying on margin. As the district court was careful to note, "Plaintiffs' brokerage statements evince a pattern of speculative day-trading, an inherently risky undertaking, by sophisticated investors, not 'hapless' plaintiffs, who systematically acquired over one million shares over a six-year period." *Glaser v. Enzo Biochem, Inc.,* 303 F. Supp. 2d 724, 750 (E.D. Va. 2003).

Someone who evinces a trading sophistication like Glaser's should not receive the special solicitude of the law when he fails to observe the most basic norms of commercial activity. In *Harris,* for instance, after noting that reliance is an essential element of fraud, the Virginia Supreme Court pointedly observed that one party "was an experienced businessman" with "business acumen, [a] familiarity with accounting procedures, and [a] knowledge of financial affairs." *Harris,* 127 S.E.2d at 70. Sophisticated investors – such as those who have "conducted [their] own independent investigation into the subject matter of [their] purchase," *id.* – rely at their peril, because their reliance on statements like those at issue here are not justifiable. *See also Horner v. Ahern,* 153 S.E.2d 216, 219 (Va. 1967) (someone who has the ability to protect himself with "ordinary care and prudence" is left by the law "where he has been placed by his own imprudent confidence").

The majority's unwillingness to recognize this legal tradition in Virginia law would have unfortunate implications if it were ever adopted by Virginia courts. It is no accident that Virginia law has developed as it has. Insubstantial suits for securities fraud simply drain energy from an economy that, in essence, is meant to remain entrepreneurial. No one doubts that overselling products like a cure for AIDS would be unfair not only to investors. It would represent a cruel hoax played against a particularly vulnerable segment of our society. On the other hand, holding that statements like the two specifically addressed above are actionable is to pile multiple legal difficulties on top of the already difficult medical challenges involved in vaccine production. Such rulings make it more difficult for vaccines of any sort – flu, smallpox, AIDS – to reach

market because many vaccine manufacturers now face additional legal disincentives to develop them. Over the past thirty years, the number of vaccine manufacturers in America has declined from twenty-five to a grand total of five manufacturers today. Denise Grady, *Before Shortage of Flu Vaccine, Many Warnings, N.Y. Times,* Oct. 17, 2004, at A1. It is not novel to attribute the disappearance of manufacturers in part to legal claims. *See, e.g., id.* ("Some companies dropped out because of lawsuits," while others found it too burdensome "to meet regulatory standards.") There may well be multiple causes for the dwindling numbers of vaccine manufacturers in our country, but it seems fair to observe that ungrounded suits in fraud will not assist in reversing the decline.

If the law actually required this consequence, so be it. But at least the Virginia law of fraud does not. I agree that six of the twelve statements are more than puffing, although Glaser must still be able to demonstrate on remand a reasonable reliance upon them. Even if those six could survive a Rule 12(b)(6) motion, the other two never could and were properly dismissed by the district court. It is this failure to strike an appropriate balance between warranted liability and the unwarranted encouragement of frivolous securities fraud actions that leads me to dissent in part from the majority opinion.

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LAWRENCE F. GLASER, ET AL., Plaintiffs,	)	CIVIL ACTION NO. 02-1242
v.	)	
ENZO BIOCHEM, INC., ET AL., Defendants.	)	

MEMORANDUM ORDER

(Filed Aug. 17, 2005)

THIS MATTER is before the Court on the Motion to Amend Complaint[1] of Plaintiffs Lawrence Glaser and Maureen Glaser, individually and on behalf of their children, ("Plaintiffs"). On July 14, 2005, this Court dismissed Plaintiffs' Amended Complaint for failure to plead loss causation under the requirements of *Dura Pharmaceuticals v. Broudo,* 125 S.Ct. 1627 (2005), issued on April 19, 2005. In their motion, plaintiffs propose twelve additional paragraphs to add to the Amended Complaint, which they believe cure the inadequately pled loss causation of the Amended Complaint. The issue before the Court is

[1] In their memorandum in support of their motion to amend the complaint, Plaintiffs state: "[i]n the alternative, to the extent the opinion dismissing the Amended Complaint is construed as a final judgment, then the plaintiffs request that this motion be considered a Rule 59 motion to reconsider." Mem. Supp. Pls.' Mot. Leave Amend at 2. The Rule 55 motion is denied because no judgment has yet been entered in the case, and Rule 59 motions are to be made after a judgment has entered. The motion is also denied because Plaintiffs put forth no argument whatsoever in support of their motion. *See id.*

whether to grant Plaintiffs leave to amend their Amended Complaint because doing so would cure the deficiencies pointed out by the Court in its Memorandum Opinion of July 14, 2005.

The Court denies Plaintiffs' motion for leave to amend because the proposed amendments are futile since they would not withstand a motion to dismiss based on the requirements announced by the Supreme Court in *Dura*. A party requires leave of court to amend a pleading more than once, but leave "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Nevertheless, if a proposed amendment is futile, a court should deny leave to amend. *Foman v. Davis,* 371 U.S. 178, 182 (1962). To plead loss causation in the securities fraud context after the Supreme Court's holding in *Dura,* a plaintiff must, at a minimum, show the stock price fell after the truth came to light about a misrepresentation, and that the plaintiff suffered damages as a result. *See id.* at 1632. In addition, in *Dura,* the Supreme Court made the point of saying that lawsuits in the securities fraud context are intended to maintain public confidence in the marketplace, "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." 125 S.Ct. at 1632.

Plaintiffs' proposed paragraphs merely point out that others, namely, Morgan Stanley, "the market," and Fidelity, may have suspected that the defendants were "exaggerating" before the March 8, 2001 shareholders' meeting. *See* ¶ 142 ("Morgan Stanley had been urging plaintiffs to liquidate or at least substantially reduce their holdings in Enzo"), ¶¶ 143 and 144 ("the market was nonetheless aware that the statements that were made at the January 2000 annual shareholders' meeting and elsewhere . . . were

exaggerated, if not outright false before March 8, 2001"), ¶¶ 147 and 148 (Fidelity divested itself from Enzo by mid to late 2000). Plaintiffs do not, however, conclusively allege that the truth about Enzo came out publicly before they sold their stocks, in advance of the March 8, 2001 shareholder meeting, and that the alleged misrepresentations account for the loss they suffered. Instead, the plaintiffs are improperly attempting to use their fraud in the securities context claim to insure themselves against the risks inherent in the stock market. Because the proposed amendments by Plaintiffs would be futile, the Court denies the plaintiffs' motion for leave to amend.[2]

For the foregoing reasons, it is hereby ORDERED that Plaintiffs' Motion for Leave to Amend is DENIED. ORDERED that Plaintiffs' Motion for Reconsideration is DENIED.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 17th day of August, 2005.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
8/17/05

[2] The Court further notes that the plaintiffs have had ample opportunity to plead their case.

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

LAWRENCE F. GLASER, ET AL., Plaintiffs,	)	CIVIL ACTION NO. 02-1242
v.	)	
ENZO BIOCHEM, INC., ET AL., Defendants.	)	

MEMORANDUM OPINION

(Filed Jul. 14, 2005)

THIS MATTER is before the Court on Defendants Enzo Biochem, Inc. ("Enzo"), Barry Weiner, Elazar Rabbani, Shahram Rabbani, John DeLucca, and Dean Engelhardt (collectively, "Enzo Defendants") Motion to Dismiss the Amended Complaint and Defendant Heiman Gross's Renewed Motion to Dismiss Amended Complaint. This Court initially dismissed the Amended Complaint by Memorandum Opinion dated July 16, 2003. The plaintiffs appealed the ruling, and the Fourth Circuit affirmed in part, reversed in part, and remanded to this Court. *See Glaser v. Enzo Biochem, Inc.*, 2005 WL 647745 (4th Cir. March 21, 2005). There are two issues presently before the Court: (1) whether to dismiss common law fraud claims against Defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross, because they made none of the statements that the Fourth Circuit upheld as the bases for common law fraud claims, and the Fourth Circuit upheld this Court's dismissal of the plaintiffs' conspiracy to commit securities fraud claim and found no abuse of discretion in its decision to deny leave to amend

to add a conspiracy to commit common law fraud claim, and (2) whether to dismiss the common law fraud claims against all the defendants because the plaintiffs no longer state a claim for common law fraud in light of the United States Supreme Court's decision in *Dura Pharmaceuticals v. Broudo*, 125 S.Ct. 1627 (2005), issued on April 19, 2005, stating that to survive a motion to dismiss in a securities fraud case, plaintiffs must allege that the share price of a stock fell significantly after the truth about a misrepresentation by defendants was revealed, and the plaintiffs did not so allege in this case.

The Court grants Defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross's motion to dismiss the common law fraud claims against them because these defendants made none of the statements that the Fourth Circuit upheld as bases for the common law fraud claims, and the Fourth Circuit upheld this Court's decision to dismiss plaintiffs' conspiracy to commit securities fraud claims and found no abuse of discretion in its decision to deny leave to amend to plead conspiracy to commit common law fraud. In addition, the Court grants the Enzo defendants' motion to dismiss the common law fraud claims against the remaining defendants because the Supreme Court's decision in *Dura* requires plaintiffs to plead causation of loss by alleging that the share price of a stock fell after the truth of a misrepresentation about the stocks was revealed, and the plaintiffs in this case did not so plead. *See* 125 S.Ct. at 1631.

I. BACKGROUND[1]

The Fourth Circuit's Decision

The Fourth Circuit's ruling, issued on March 21, 2005, affirmed in part and reversed in part this Court's decision to dismiss all claims against the defendants and remanded the action to this Court. *See Glaser*, 2005 WL 647746, at **8. The Fourth Circuit held that this Court "properly dismissed the plaintiffs' federal securities fraud and conspiracy claims as a matter of law." *Id.* It also held that this Court did not abuse its discretion in denying the plaintiffs' motion for leave to amend the Amended Complaint to add a conspiracy to commit common law fraud claim, stating, "[t]o the extent that the plaintiffs argue that they should have been permitted to amend their complaint to include a claim for conspiracy to commit common law fraud, we conclude that the district court did not abuse its discretion . . . " *Id.* In addition, the Fourth Circuit reversed this Court's holding as to eight of the twelve statements alleged in support of the plaintiffs' common law fraud claim, holding that eight could serve as the basis for the plaintiffs' common law fraud claims. The actionable statements consist of (1) two allegedly made by Defendant Dean Engelhardt ("Mr. Engelhardt") at a January 12, 2000 shareholders meeting, (2) three allegedly made by Defendant Barry Weiner ("Mr. Weiner") at the same meeting, and (3) three allegedly made in Enzo press releases after that meeting. *See id.* at **8 n. 6. The statements allegedly made by Mr. Engelhardt were:

---

[1] The Court declines to restate the allegations of the Amended Complaint as the Fourth Circuit and this Court's prior opinion in this case do so exhaustively.

(1) "It works, they both work," and

(2) "The virus goes in but does not come out."

The statements allegedly made by Mr. Weiner were:

(1) that Enzo had submitted Phase I data to the FDA and was awaiting Phase II approval,

(2) that Enzo scientists had reduced the time required for HGTV-43 transduction from up to three months to eighteen hours, and

(3) that the HGTV-43 vector achieves levels of stable transduction greater than 30%.

The statements allegedly made through Enzo press releases were:

(1) the University of California clinical study was moving to its final stages, an abstract was to be presented to the American Society of Gene Therapy in June 2000, Enzo knew of no other system that achieved the results that its gene therapy had achieved, and plans for Phase II trials were proceeding,

(2) the HGTV-43 vector successfully delivered certain genes to blood stem cells and engineered cells continued to survive after transduction, and

(3) data from the first person treated in the Phase I trial of HGTV-43 showed successful engraftment of engineered cells into the patient's bone marrow.

Defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross now argue that the remaining common law fraud claims against them should be dismissed because none of these individuals made any of

these actionable statements. The plaintiffs, on the other hand, argue that "this contention . . . ignores the fact that the liability of these defendants is and always has been based on their participation in a conspiracy with the individuals who did make the statements." Pls.' Mem. Opp'n to Enzo Defs.' Latest Mot. Dismiss at 10. Because, the plaintiffs assert, the Amended Complaint pleads a conspiracy to commit fraud, these defendants should also be held liable for the statements made by Mr. Engelhardt, Mr. Weiner, and by Enzo.

The Supreme Court's Decision in Dura Pharmaceuticals

After the Fourth Circuit's ruling in this case on March 21, 2005, the Supreme Court issued an opinion on April 19, 2005, in *Dura Pharmaceuticals*, regarding the elements of a securities fraud claim required to survive a 12(b)(6) motion. 125 S.Ct. 1627. The *Dura* plaintiffs, purchasers of stock in a pharmaceutical company, alleged that the defendants made false statements about expected future Food and Drug Administration approval of a new asthmatic spray device that artificially inflated the price of stock in the company. The plaintiffs alleged that they purchased the stock at inflated prices and that they suffered "damages" as a result. *Id.* at 1630. The Supreme Court overruled the Ninth Circuit's decision holding that such an allegation satisfied the loss causation requirement, or the necessity for a causal link between the material misrepresentation and the loss. In doing so, the Court relied heavily on the requirement to plead loss causation and its definition in common law tort actions for deceit and misrepresentation. *Id.* at 1631. In particular, the Court held that the plaintiffs failed to plead a causal link between the material misrepresentation and the loss

merely by alleging that they purchased the defendant company's stock at inflated prices. *Id.* (" . . . an inflated purchase price will not itself constitute or proximately cause the relevant economic loss"). Instead, concluded the Court, to properly plead the element of loss causation in a fraud claim, a plaintiff must allege that the price fell after the truth came to light about a misrepresentation, and that the plaintiff suffered damages as a result, and even this may not be sufficient to show actual, loss. *See id.* at 1632 ("But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss. If the purchaser sells after the truth makes it may [sic] into the market place, an initially inflated purchase price *might* mean a later loss").

In light of this new precedent, the defendants in this case argue that the plaintiffs' claim of common law fraud against all the defendants should be dismissed, since the plaintiffs in this case make the same kinds of inflated purchase price allegations that the *Dura* plaintiffs did. In other words, the defendants assert that the plaintiffs do not properly allege "loss causation," instead alleging that the truth about Enzo's science was not revealed until *after* the plaintiffs had already sold their shares. *See* Mem. Enzo Defs. Supp. Mot. Dismiss Amended Compl. at 9. The plaintiffs, on the other hand, argue that *Dura* can be distinguished from the case at hand because (1) *Dura* addresses a securities fraud claim, while this case concerns a common law fraud claim, (2) *Dura* does not change the law existing in the Fourth Circuit at the time it issued its opinion in this case, and (3) *Dura* involves a different damages claim from this case.

II. DISCUSSION

A. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion should not be granted unless it appears beyond a doubt that a plaintiff can prove no set of facts in support of the, plaintiff's claim that would entitle the plaintiff to relief. FED. R. CIV. P. 12(b)(6); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory allegations regarding the legal effect of the facts alleged need not be accepted. *See Labram v. Havel,* 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a fair response. *Conley,* 355 U.S. at 47.

B. Analysis

Issue 1: Claims against defendants who made no actionable statements

The Court dismisses the plaintiffs' claims against Defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross because they did not make any of the statements deemed actionable by the Fourth Circuit, and because the Fourth Circuit upheld dismissal of the plaintiffs' conspiracy to commit securities fraud claims and upheld this Court's decision to deny leave to amend to plead conspiracy to commit common law fraud.

The statements held actionable by the Fourth Circuit were made either by Defendant Engelhardt, Defendant Weiner, or through Enzo press releases. None of these statements were made by Defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, or Heiman Gross.

To properly plead a Virginia common law fraud claim a plaintiff must allege a false representation of material fact, made intentionally and knowingly, with intent to mislead, reliance by the party misled and resulting damage to the party misled. *See Glaser*, 2005 WL 647745, at **5 (citations omitted). The plaintiffs fail to plead that these individual defendants made false representations, instead pointing to Enzo's press releases, and statements made by Mr. Engelhardt and Mr. Weiner. Furthermore, Defendants Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross cannot be liable for statements in Enzo's press releases because the Fourth Circuit found the plaintiffs did not allege any conspiracy to commit common law fraud in their Amended Complaint. *See id.* at **8 ("To the extent that the plaintiffs argue that they should have been permitted to amend their complaint to include a claim for conspiracy to commit common law fraud, we conclude that the district court did not abuse its discretion . . . "). Consequently, the Court grants these defendants' motion to dismiss, the complaint against them.

Issue 2: The Supreme Court's Holding in Dura Pharmaceuticals

The Court grants the defendants' motion to dismiss the remaining common law fraud claims because the plaintiffs fail to properly allege "loss causation" in their Amended Complaint, following the Supreme Court's decision in *Dura*. *Dura* made clear that to state a claim for

securities fraud, a plaintiff must allege more than merely purchasing stocks at inflated prices to satisfy the loss causation element. 125 S.Ct. at 1631. Although this case concerns common law fraud in connection with the sale of securities, not statutory securities fraud, *Dura*'s loss causation analysis applies because the Supreme Court relied heavily on definitions of loss causation drawn from the torts of misrepresentation and deceit, the very same type of claim alleged here. *Id.* 1632-33 (discussing how judicially implied private securities-fraud actions resemble common law deceit and misrepresentation actions and focusing on the element of loss causation).

As in *Dura*, the plaintiffs in this case allege that their loss is caused by purchasing stocks at artificially inflated prices due to misrepresentations by the defendants. *See, e.g.*, Amended Compl. ¶¶ 44, 45, 61, 62, 64, 70, 84, 106, 114, 115, 135, 136, 137, 138 (referencing artificially inflated prices). When questioned by the Court about what theory of loss causation the plaintiffs were asserting, their counsel was unable, to articulate an alternative basis for the loss. Plaintiffs' counsel pointed the Court to paragraphs 12, 25, 26, 30, 137 and 138 of the Amended Complaint, none of which provide an alternative basis for loss causation. Instead, they all merely reassert that due to defendants' conduct, Plaintiffs bought their stocks at artificially inflated prices, ultimately had to liquidate their stocks, and were forced to file for bankruptcy. Not only do none of these paragraphs tie the loss to the revelation of the truth about the misrepresentation, as required by *Dura*, but also, the plaintiffs allege that the first time they became aware of the falsity of the statements was on March 8, 2001, *after they had sold off all of their stocks.* Amended Compl. ¶ 119. Plaintiffs, in their opposition to

Defendants' motion, do not dispute that they had sold all their stocks before March 8, 2001. Because the plaintiffs do not establish loss causation, as required by *Dura*, the Court grants the defendants' motion to dismiss the common law fraud claims against the plaintiffs.

Plaintiffs' argument in opposition to this motion, that the Fourth Circuit's decision stating that the plaintiffs established the elements of common law fraud is the "law of the case," and that, therefore, the Supreme Court's decision in *Dura* is irrelevant to this case, is incorrect. Under the "law of the case" doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 304 (4th Cir. 2000) (citations and internal quotations omitted). Here, however, the Fourth Circuit opinion focused on whether the plaintiffs met the materiality and reliance requirements of common law fraud; it did not address loss causation at all. *Glaser*, 2005 WL 647745, at **6-**8. Consequently, because the Fourth Circuit did not decide the issue of loss causation, there is no Fourth Circuit holding to apply as "law of the case" here. Furthermore, even if the Fourth Circuit's decision is the "law of the case," an intervening decision by the Supreme Court trumps the Fourth Circuit's decision. *Columbus-America*, 203 F.3d at 304 (stating that if controlling authority has since made a contrary decision of law applicable to the issue, the "law of the case" doctrine does not apply) (citation omitted)). A decision by the Supreme Court of the United States certainly constitutes "controlling authority." Consequently, because the plaintiffs did not properly allege loss causation under *Dura*, the

Court grants defendants' motion to dismiss the claims against them.

III. CONCLUSION

The Court dismisses the Amended Complaint against Elazar Rabbani, Shahram Rabbani, John DeLucca, and Heiman Gross because none of the statements held actionable by the Fourth Circuit were made by these defendants. The Court dismisses the Amended Complaint against the remaining defendants because, like the plaintiffs in *Dura*, the Glasers fail to establish the element of "loss causation." For the foregoing reasons, it is hereby

ORDERED that Defendants Enzo Biochem, Inc., Barry Weiner, Elazar Rabbani, Shahram Rabbani, John DeLucca, and Dean Engelhardt Motion to Dismiss the Amended Complaint is GRANTED, and it is

ORDERED that Defendant Heiman Gross's Renewed Motion to Dismiss Amended Complaint is GRANTED. This case is DISMISSED.

The Clerk is directed to forward a copy of this Order to counsel of record.

ENTERED this 14th day of July, 2005.

/s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
7/14/05

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 18, 2006

No. 05-1920
CA-02-1242

LAWRENCE F. GLASER, individually and on behalf of Kimberly, Erin, Hannah and Benjamin Glaser; MAUREEN GLASER, individually and on behalf of Kimberly, Erin, Hannah and Benjamin Glaser

Plaintiffs-Appellants

v.

ENZO BIOCHEM, INCORPORATED; HEIMAN GROSS; BARRY WEINER; ELAZAR RABBANI; SHARIM RABBANI; JOHN DELUCCA; DEAN ENGELHARDT

Defendants-Appellees

and

RICHARD KEATING; DOUG YATES; JOHN DOE, 1-50

Defendants

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Chief Judge Wilkins, Judge Gregory, and Chief District Judge Anderson.

For the Court,

/s/ Patricia S. Connor
CLERK

(2)

No. 06-987

FILED
FEB 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

LAWRENCE F. GLASER, and MAUREEN GLASER, individually and on behalf of KIMBERLY, ERIN, HANNAH, and BENJAMIN GLASER,

Petitioners,

versus

ENZO BIOCHEM, INC., HEIMAN GROSS, BARRY WEINER, ELAZAR RABBANI, SHARIM RABBANI, JOHN DELUCCA, DEAN ENGELHARDT, and DOES 1-50,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Respondent Enzo Biochem, Inc. states that it is a publicly held New York Corporation (listed on the New York Stock Exchange), and that there are no parent corporations or publicly held companies owning 10% or more of its stock.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT	8
I. THE RULING BELOW ON LOSS CAUSATION IS ENTIRELY CONSISTENT WITH VIRGINIA COMMON LAW AND DOES NOT RAISE AN ISSUE WORTHY OF THIS COURT'S ATTENTION	8
A. Virginia Law Requires Pleading of Loss Causation	8
B. The Petitioners Failed To Allege The Requisite Loss Causation	10
C. The Fourth Circuit Properly Relied On This Court's Analysis In Dura	14
D. The Fourth Circuit Opinion Is Not Contrary To The Securities Litigation Uniform Standards Act Or This Court's Holding In *Merrill Lynch v. Dabit*	15
II. THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF FURTHER LEAVE TO AMEND THE COMPLAINT, PARTICULARLY IN LIGHT OF THE PRIOR HISTORY IN THIS ACTION, AND IN ANY EVENT, APPLIED THE PROPER STANDARD OF REVIEW SO THERE IS NO ISSUE THAT WARRANTS THE REVIEW OF THIS COURT	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Arent v. Distribution Sciences, Inc., 975 F.2d 1370 (8th Cir. 1992) 14

Arnlund v. Deloitte & Touche LLP, 199 F. Supp. 2d 461 (E.D. Va. 2002) 8, 13

Bastian v. Petren Res. Corp., 892 F.2d 680 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990) 9

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 12

Catton v. Defense Tech. Sys. Inc., No. 05 Civ. 6954, 2006 U.S. Dist. LEXIS 205 (S.D.N.Y. Jan. 3, 2006) 10

Caviness v. DeRand Resources Corp., 983 F.2d 1295 (4th Cir. 1993) 8

Citibank, N.A. v. K-H Corp., 968 F.2d 1489 (2d Cir. 1992) 9

Cohn v. Knowledge Connections, Inc., 266 Va. 362, 585 S.E.2d 578 (2003) 9

Crocker v. Federal Deposit Ins. Corp., 826 F.2d 347 (5th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) 14

Dura Pharmaceuticals v. Broudo, Inc., 544 U.S. 336 (2005) 1, 6, 10, 14, 15

Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc., 343 F.3d 189 (2d Cir. 2003) 9

Hunt v. Enzo Biochem, Inc., No. 06 Civ. 170, 2006 U.S. Dist. LEXIS 89175 (S.D.N.Y. Dec. 11, 2006) 9, 11, 19

Lambert v. Downtown Garage, Inc., 44 Va. Cir. 102, 104 (1997), *aff'd*, 262 Va. 707, 553 S.E.2d 714 (2001) 8, 16

TABLE OF AUTHORITIES – Continued

Page

Lawal v. RTM, No. 06-12250, 2006 U.S. App. LEXIS 30856 (11th Cir. Dec. 12, 2006) 18

Merrill Lynch v. Dabit, 126 S. Ct. 1503 (2006) 12, 15, 16

Ong v. Sears, Roebuck & Co., 459 F. Supp. 2d 729 (N.D. Ill. 2006) 9

Sit-Set, A.G. v. Universal Jet Exchange, Inc., 747 F.2d 921 (4th Cir. 1984) 14

Weinstein v. Ebbers (In re Worldcom, Inc. Sec. Litig.), 336 F. Supp. 2d 310 (S.D.N.Y. 2004) 12

In re Worldcom, Inc. Sec. Litig., Master File No. 02 Civ. 3288, 04 Civ. 0232, 2006 U.S. Dist. LEXIS 11679 (S.D.N.Y. Mar. 22, 2006) 12

MISCELLANEOUS

Prosser & Keeton, *Torts* § 110 (5th ed. 1984) 9

Restatement of Torts (Second), § 548A (1977) 10

INTRODUCTION

The petition for certiorari raises two issues, neither of which remotely merits this Court's review. The first issue is strictly an issue of state common law. The Fourth Circuit properly determined that a Virginia common law fraud claim requires sufficient allegations of causation, and that the Petitioners' complaint failed to allege the requisite loss causation, as described in part in this Court's decision in *Dura Pharmaceuticals v. Broudo, Inc.*, 544 U.S. 336 (2005). The Fourth Circuit's holding on this point did not conflict with any decision by a court of last resort in the state of Virginia. Indeed, Petitioner does not cite to a single case from the courts of the state of Virginia. The second issue raised in the petition concerns a well-settled procedural issue: the standard of review to be applied to a District Court's discretionary denial of further leave to amend a pleading. The Fourth Circuit properly affirmed the District Court's exercise of discretion in denying further leave to amend citing in particular the Petitioners' thirteen months of unilateral pre-action discovery and four prior failed attempts to plead their claims. While Petitioners now seek to characterize the Fourth Circuit's denial of leave to re-plead solely on the basis of futility and cite to an apparent split in the Circuits on application of the abuse of discretion standard to such a determination, the facts of this case on their face do not in any event make it appropriate for consideration of such issue as the denial of leave to re-plead here was not based on futility alone.

In sum, the Fourth Circuit's opinion addresses a non-controversial state common law issue and a well-settled procedural issue. The opinion below does not conflict with any opinion of this Court nor does it conflict with any

opinion of another Court of Appeals or Virginia state court. The opinion below does not raise any important question of federal law or represent any meaningful departure from the accepted and usual course of judicial proceedings. In the end, Petitioners' quarrel is directed at little more than the application of settled common law standards to the unique facts alleged in their case. Nothing in the Fourth Circuit's opinion, however, warrants this Court's attention. Accordingly, the petition should be denied.

COUNTER-STATEMENT OF THE CASE

A. General Background

Respondent Enzo Biochem, Inc. ("Enzo") is a biotechnology company engaged in the research, development and marketing of innovative health care products. (A. 343).[1] Enzo's stock has been publicly traded for approximately 25 years. (A. 255, ¶ 2). The individual Respondents are officers and directors of Enzo, with the exception of Respondent Heiman Gross who is an outside consultant to Enzo. (A. 259-60, ¶¶ 15-18).[2] Petitioner Lawrence Glaser and his family (collectively "Petitioners") were speculators in Enzo stock – buying and selling tens of thousands of Enzo shares on virtually a daily basis for several years, including

[1] References to "A. ___" are to pages of the Sealed Appendix filed in the U.S. Court of Appeals for the Fourth Circuit. References to "Pet." are to the Petition for Certiorari and "App. Pet." to the Appendix attached to the Petition. Most of the relevant facts have, of course, been set forth in the Fourth Circuit and District Court opinions. (App. Pet. 1-49)

[2] Petitioners incorrectly state in their List of Parties that all Respondents are residents and citizens of New York. In fact, Respondent DeLucca is not a citizen and resident of New York.

during the biotech stock "bubble" of late 1999/early 2000.[3] (A. 452-622). Petitioners allegedly purchased Enzo shares on margin and continued to day-trade Enzo stock as the biotech market peaked in early 2000, and then trended downward. (A. 574-80; 560-63). At least part of Petitioners' alleged basis for trading Enzo stock was their receipt of alleged "inside information" from unspecified sources that later proved to be false. (A. 280-81, 292-93, ¶¶ 92-94, 130).

Petitioners allegedly accumulated a significant position in Enzo stock, but by December 2000, were allegedly forced by margin calls to sell their entire Enzo position, resulting in their alleged losses.[4] (A. 259, ¶ 12). On or about January 19, 2001, Petitioner Lawrence Glaser filed for bankruptcy protection in the Eastern District of Virginia. (A. 259, ¶ 12). On March 8, 2001, well after Petitioners had sold all their Enzo shares, Petitioners allegedly learned for the

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[3] From late 1999 through the early months of 2000, the biotechnology sectors of the stock market staged a furious rally. This biotechnology "bubble," as it was commonly known, commenced deflating in early 2000 and then "burst" unexpectedly on or about March 15, 2000 after public statements by President Clinton and Prime Minister Tony Blair threatened the profitability of the gene-based biotech businesses such as Enzo.

[4] During the most relevant time period of January through April 2000, when Petitioners were allegedly induced to *purchase* Enzo shares, they actually also *sold* substantial amounts of Enzo shares on virtually a daily basis. In January 2000, when most of the alleged material misrepresentations were allegedly made, Petitioners *sold* in excess of 150,000 shares for approximately $12 million. In February 2000, Petitioners *sold* more than 80,000 shares for well over $5 million. In March 2000, Petitioners *sold* more than 65,000 Enzo shares for approximately $5 million. In April 2000, Petitioners *sold* more than 250,000 Enzo shares for over $26 million. (A. 567-580). After April 2000, Petitioners were allegedly net sellers of Enzo stock. (A. 261 ¶ 26). As District Judge Lee and Circuit Judge Wilkinson observed, Petitioners' trading records evince an astounding and consistent pattern of day trading. (A. 574-80; 560-63).

first [illegible]e that Enzo had misrepresented facts relating to the efficacy of Enzo's gene therapy, which alleged facts purportedly had artificially inflated Enzo's share price. (A. 289, ¶ 119).[5]

B. Plaintiffs Prepare And Serve Multiple Complaints

Through the use of Fed. R. Bankr. P. 2004 ("Rule 2004"), Petitioners were able to pursue unilateral discovery for thirteen months prior to filing their initial complaint against Respondents, obtaining access through subpoenas to volumes of documents from numerous parties (including highly confidential Enzo documents) and taking depositions of Enzo representatives along with many other parties. (A. 291, ¶ 125). This discovery was for the express purpose of framing the complaint that was ultimately dismissed by the Fourth Circuit. (A. 291, ¶ 125). Petitioners first filed a complaint against the Respondents and others on or about March 6, 2002, alleging, among other things, claims for federal securities fraud, common law fraud and conspiracy. The Petitioners' complaint essentially alleged that beginning in January 2000, Respondents made false statements of fact that inflated the price of Enzo's stock, and that Petitioners were "fraudulently induced to invest in and retain common shares of Enzo at artificially inflated prices." (A. 271-72, 277, 287, 294; Complaint ¶¶ 64, 70, 84, 114 and 135). Petitioners alleged that, had they known the truth, they would have sold their shares, and/or would not have

[5] Petitioners allegedly learned the truth at a public meeting of the Recombinant DNA Advisory Committee (or RAC), a committee formed by the National Institute of Health in response to public concerns over the safety of genetic research and technology. (A. 289, ¶ 119).

purchased additional shares. (A. 295, ¶ 135). The complaint alleged that the "truth" regarding the alleged misrepresentations was revealed to the public on March 8, 2001. (A. 286, 289; Complaint ¶¶ 109 and 119).

After Respondents moved to dismiss the Petitioners' first complaint, Petitioners filed an amended complaint thereby mooting Respondents' first dismissal motion. (A. 40). Subsequently, in August 2002, on the eve of a second motion to dismiss, Petitioners voluntarily dismissed the entire action and simultaneously filed a new action, with a third complaint containing the same essential claims. (A. 254). Respondents then filed another motion to dismiss the third complaint, prompting Petitioners to file yet another amended complaint, again mooting Respondents' motion. (A. 254). The Respondents then moved to dismiss the Petitioners' fourth and final iteration of their complaint. [6] (A. 254).

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[6] The Petitioners' fourth complaint contained four counts, the first two counts for federal securities fraud, and the remaining counts for common law fraud and breach of fiduciary duty. (A. 257, ¶ 7). The crux of the complaint was an alleged "pump and dump" scheme whereby Respondents allegedly "pumped" the stock price with false information so that insiders could then "dump" the stock. (A. 258, ¶ 10). The allegedly misleading statements were mostly made at the annual shareholders' meeting held on January 12, 2000. Curiously, on the next trading day following the allegedly misleading "hype", Petitioners sold 10,000 Enzo shares and also purchased 10,000 Enzo shares. (A. 574-75; 561). Petitioners also assert that "[o]n March 28, 2000, three of the five directors sold a total of 600,000 shares at $81/share." (Pet. 6). In fact, the public trading records disclose that roughly 238,000 total shares of Enzo were traded on that day so Petitioners' allegation could not possibly be true. In addition, it was publicly disclosed in Form 4s that the three directors made gift transfers to their children's trusts, not sales.

C. The First Appeal to the Fourth Circuit

The U.S. District Court for the Eastern District of Virginia granted Respondents' motion to dismiss in its entirety, and Petitioners appealed. On appeal, the Fourth Circuit affirmed the dismissal of all of the Petitioners' claims, including the federal securities fraud and conspiracy claims (App. Pet. 13-35), with the sole exception of the common law fraud claim. As to the common law fraud claim, the District Court had articulated two bases for its dismissal – the inadequate pleading of a material misstatement and reasonable reliance. The Fourth Circuit reversed the District Court in part on the common law fraud claim, holding that only eight of the alleged material misstatements were actionable under the Virginia common law of fraud and that reasonable reliance was sufficiently alleged. (App. Pet. 26-29, 31 n. 6). The Fourth Circuit did not reach or address the issue of loss causation. (App. Pet. 3). Nor did the Fourth Circuit address the ramifications of its holdings on the individual defendants. The case was then remanded to the District Court for further proceedings. (App. Pet. 31).

D. The Second Appeal to the Fourth Circuit

Following remand, Respondents filed a motion to dismiss the sole remaining claim for common law fraud on two grounds that had not previously been addressed. First, Respondents moved to dismiss the common law fraud claim based on the failure to plead adequate loss causation under Virginia common law, relying in part on this Court's analysis in *Dura* which had been issued subsequent to the Fourth Circuit's opinion. Second, Respondents separately moved to dismiss the common law fraud claim against the individual Respondents Elazar Rabbani, Shahram Rabbani,

John Delucca, and Heiman Gross, because none of those individuals were alleged to have made any of the actionable statements left standing by the Fourth Circuit's first opinion.

On July 14, 2005, the U.S. District Court for the Eastern District of Virginia granted Respondents' motion to dismiss the Complaint on both grounds. (App. Pet. 39-49). The District Court also denied Petitioners' motion to amend their complaint for a fifth time, noting that Petitioners "have had ample opportunity to plead their case." (App. Pet. 38). Petitioners appealed, and the Fourth Circuit affirmed the District Court's dismissal of the Complaint, as well as the denial of leave to amend, holding that the Petitioners' Complaint failed to allege any loss causation under Virginia common law, and given the Petitioners' four prior amendments and extensive pre-action discovery, leave to amend had been properly denied.[7] (App. Pet. 1-12). Petitioners then moved for a rehearing en banc which was subsequently denied. This petition for certiorari followed.

[7] The Fourth Circuit also affirmed the dismissal of the fraud claims against individual Respondents Elazar Rabbani, Shahram Rabbani, John Delucca and Heiman Gross because they had made no actionable misstatements. The Petitioners do not seek review of this portion of the Fourth Circuit's opinion.

ARGUMENT

I.

THE RULING BELOW ON LOSS CAUSATION IS ENTIRELY CONSISTENT WITH VIRGINIA COMMON LAW AND DOES NOT RAISE AN ISSUE WORTHY OF THIS COURT'S ATTENTION

A. Virginia Law Requires Pleading of Loss Causation

Petitioners cannot reasonably dispute that the Virginia common law of fraud – like the common law of fraud in other states – requires pleading and proof of proximate causation. Under Virginia common law, "Fraud is a tort. Causation is an essential ingredient of tort actions, whether created by statute or common law." *Lambert v. Downtown Garage, Inc.*, 44 Va. Cir. 102, 104 (1997), *aff'd*, 262 Va. 707, 553 S.E.2d 714 (2001); *see, e.g., Caviness v. DeRand Resources Corp.*, 983 F.2d 1295, 1305 (4th Cir. 1993) (common law fraud claim dismissed because of failure to make required showing of proximate causation); *Arnlund v. Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 489 (E.D. Va. 2002) (common law fraud claim dismissed for failure adequately to plead causation between the misrepresentation and the harm).

In connection with a common law fraud claim involving the purchase or sale of securities, pleading of proximate causation is necessary because "if false statements are made in connection with the sale of corporate stock, losses due to a subsequent decline in the market, or insolvency of the corporation brought about by business conditions or other factors in no way relate[d] to the representations will not afford any basis for recovery."

Prosser & Keeton, *Torts* § 110, p. 767 (5th ed. 1984). Thus, a plaintiff asserting common law fraud in Virginia must properly allege proximate causation. *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 369, 585 S.E.2d 578, 582 (2003) ("The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.").

As part of its obligation to allege and prove proximate causation, a plaintiff asserting a common law fraud claim must plead and establish loss causation. Like the Fourth Circuit, other courts have similarly held that state law requires express pleading of "loss causation" when pleading a common law fraud claim. *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) ("Similar to loss causation, the proximate cause element of common law fraud requires that plaintiff adequately allege a causal connection between defendants' non-disclosures and the subsequent decline in the value of [the] securities."); *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1497 (2d Cir. 1992) (dismissing common law fraud claim for failure to plead proximate causation); *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990) ("If . . . ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures, then the plaintiffs . . . lost nothing by reason of the defendants' fraud and have no claim to damages."); *Ong v. Sears, Roebuck & Co.*, 459 F. Supp. 2d 729, 742 (N.D. Ill. 2006) ("plaintiffs in securities fraud actions, as in common law actions for deceit and misrepresentation, must adequately allege and prove the traditional elements of causation and loss."); *Hunt v. Enzo*

Biochem, Inc., No. 06 Civ. 170, 2006 U.S. Dist. LEXIS 89175, at *53 (S.D.N.Y. Dec. 11, 2006) ("While *Dura* involved a federal fraud claim, it is also applicable to common law fraud claims because the element of causation is the same in both."); *Catton v. Defense Tech. Sys. Inc.*, No. 05 Civ. 6954, 2006 U.S. Dist. LEXIS 205, at *42 (S.D.N.Y. Jan. 3, 2006) ("Because state law fraud claims require a pleading of proximate causation, the deficiency in plaintiffs' pleading of loss causation likely dooms its remaining state law claim."). *See* Restatement of Torts (Second), § 548A at p. 107 (1977) ("there is no liability when the value of the stock goes down after the sale, not in any way because of the misrepresented financial condition, but as a result of some subsequent event that has no connection with or relation to its financial condition . . . Although the misrepresentation has in fact caused the loss, since it has induced the purchase without which the loss would not have occurred, it is not a legal cause of the loss for which the maker is responsible.").

Accordingly, contrary to Petitioners' fundamental premise, Petitioner was in fact required to plead and prove loss causation under Virginia common law. The Fourth Circuit opinion does not represent a departure from settled law, but rather a proper application of it, and as such, it does not warrant review by this Court.

B. The Petitioners Failed To Allege The Requisite Loss Causation

Petitioners failed to satisfy the requisite pleading of loss causation under Virginia common law. Throughout their Complaint, Petitioners simply repeated the same incantation expressly rejected by this Court in *Dura* that

they were "fraudulently induced to invest in and retain common shares of Enzo at artificially inflated prices." (A. 271, 272, 287, 288 and 294). But this type of inflated purchase price theory of causation is insufficient to allege loss causation under Virginia common law, just as it was under the federal securities laws, as it simply does not tie the Petitioners' claimed economic loss to the alleged material misrepresentations. As this Court recognized in *Dura*, after analyzing in part the well-established common law causation principles applicable to a fraud claim, an inflated purchase price will suffice alone as the proximate cause of the relevant economic loss. 544 U.S. at 344. In fact, Petitioners' pleading effectively negated causation because, according to their own Complaint, Petitioners had sold all their Enzo shares before the public allegedly became aware of the true facts at the March 8, 2001 RAC meeting. (A. 286, 289 ¶¶ 109, 119). Even the Petitioners' belated proposed new (fifth) pleading would not cure the deficiencies in their Complaint.[8] *See Hunt* (Court dismisses virtually identical complaint filed by Petitioners' counsel for lack of loss causation under common law). Petitioners exaggerate the burdens imposed on them as they repeatedly intimate that the Fourth Circuit's opinion leaves them (and unknown others with fraud claims) without an effective remedy. The Fourth Circuit *properly* leaves plaintiffs whose losses were caused by external

[8] Petitioners proposed new pleading, albeit more than a dollar short and a day late (see Point II below), relies largely upon vague and conclusory references to unexplained "market corrections" (Pet. 20) and unexplained knowledge of certain "segments of the market" (Pet. 20-21). These conclusory proposals for Petitioners' fifth iteration of their complaint (which in part contradicts the prior four versions of their Complaint) still would not have properly alleged loss causation.

causes (unrelated to any alleged material misrepresentations) without a remedy.[9] The Fourth Circuit does not impose a new or burdensome standard on Petitioners, it enforces an old and traditional standard at common law.

Similarly, and further illustrating the Petitioners' refusal to accept the well-established causation principles applicable to their claims, Petitioners continue to point to their allegations that they retained shares purchased prior to any wrongdoing which they would have sold had they known the truth. (Pet. 12-13). This type of claim is generally referred to as a "holder" claim and is, of course, barred under the federal securities laws. Indeed, this Court recently reiterated its grave concerns about "holder" claims first expressed in its seminal decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31 (1975). *See Merrill Lynch v. Dabit*, 126 S. Ct. 1503 (2006). Such "holder" claims have likewise often been rejected at common law in many jurisdictions[10] and were properly

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[9] The Petitioners' inability to allege the requisite causal connection between their alleged losses and the alleged material misstatements is not in the least surprising on many levels. Significantly, there were well-established market forces at work during the relevant time period affecting biotech stocks in general. Indeed, as previously noted, the relevant period has commonly been referred to as the biotech bubble. Moreover, Petitioners' difficulties in alleging, much less establishing, causation are compounded by the nature and magnitude of their trading activity in Enzo stock. (*See* A. 452-622, and particularly A. 574-580).

[10] One court "surveyed the law of jurisdictions around the country and noted that common law claims by holders have been routinely rejected because either damage claims by holders are too speculative, loss causation can not be shown, or it is too difficult to prove reliance." *In re Worldcom, Inc. Sec. Litig.*, Master File No. 02 Civ. 3288, 04 Civ. 0232, 2006 U.S. Dist. LEXIS 11679, at *15 (S.D.N.Y. Mar. 22, 2006), *citing Weinstein v. Ebbers (In re Worldcom, Inc. Sec. Litig.)*, 336 F. Supp. 2d 310, 319-20 (S.D.N.Y. 2004).

rejected by the Fourth Circuit in this case as well because Petitioners could not establish loss causation. Indeed, there is no support in Virginia common law for such a "holder" claim. In *Arnlund v. Deloitte & Touche LLP*, 199 F. Supp. 2d 461, 486-90 (E.D. Va. 2002), the court specifically addressed an identical claim under the Virginia common law of fraud based on analogous allegations asserted by shareholders who allegedly retained their shares in reliance on the defendant accountant's alleged misrepresentations. The *Arnlund* Court granted defendant's motion to dismiss that common law fraud claim precisely because the plaintiffs *could not sufficiently allege loss causation*. *Id.* As the *Arnlund* Court explained, and numerous other courts have similarly held, shareholders whose loss is allegedly occasioned by their retention of shares in reliance on an alleged fraud simply cannot establish causation for their loss because if the "true facts" had been disclosed earlier, the same loss in share price would have occurred only a little earlier. The loss in such circumstances is not caused by the misrepresentation but by the truth, and plaintiffs such as Petitioners here cannot possibly satisfy the loss causation requirement. As the Fifth Circuit further explained:

> "The flaw in the . . . argument is that it assumes a market for the stock existed at an artificially high price. This inflated price, and hence the particular market for the stock, was maintained only because of the wrongdoing. . . . It follows that, had this information been released, the stock price would have immediately and precipitously fallen. . . . Thus, there would have been no market for the stock at the artificially high price. Without such a market, the . . . envisioned 'profit opportunity' evaporates into hardly more than an illusion."

Crocker v. Federal Deposit Ins. Corp., 826 F.2d 347, 351 (5th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). *See Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370, 1374 (8th Cir. 1992); *Sit-Set, A.G. v. Universal Jet Exchange, Inc.*, 747 F.2d 921, 928-29 (4th Cir. 1984) (loss of unrealized sale not caused by misrepresentations since knowledge of true facts would have precluded contract in first place).

C. The Fourth Circuit Properly Relied On This Court's Analysis In Dura

Contrary to Petitioners' contentions (Pet. 11), Respondents do not claim that *Dura* changed the Virginia common law of fraud, but rather that it clarified the requirements for pleading loss causation in a securities trading context. Petitioners complain long and loud about the distinctions between *Dura* and this case and suggest that the Fourth Circuit improperly applied *Dura* to their common law fraud claim. (Pet. 11-12). Petitioners ignore, however, this Court's analysis in *Dura* which was clearly instructive. While it is true that *Dura* was a federal securities fraud class action, and as such, based on a fraud-on-the-market theory of reliance, it does not follow that the Fourth Circuit misconstrued *Dura*. This Court specifically noted in *Dura* that "[j]udicially implied private securities-fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions." 544 U.S. at 343. This Court also observed: "[g]iven the common-law roots of the securities fraud action (and the common-law requirement that a plaintiff show actual damages), it is not surprising that other courts of appeals have rejected the Ninth Circuit's "inflated purchase price" approach to proving causation and loss." 544 U.S. at 344. This Court emphasized in *Dura* that the loss causation

requirement required for pleading violations of federal securities law was taken from, and applicable to, the common law tort requirement of showing proximate cause: "the common law has long insisted that a plaintiff in such a [fraud] case show not only that had he known the truth he would not have acted, but also that he suffered actual economic loss." *Dura*, 544 U.S. at 343-44. The reasoning of *Dura* applies with equal force to the need to establish loss causation for any fraud claim in a securities trading context, be it statutory or common law, because all such claims require a showing of proximate causation. The Fourth Circuit opinion properly cited *Dura* for its analysis and the proposition that Petitioners were required to plead loss causation under state common law. Review of that state common law issue by this Court is not warranted.

D. The Fourth Circuit Opinion Is Not Contrary To The Securities Litigation Uniform Standards Act Or This Court's Holding in *Merrill Lynch v. Dabit*

In their strained effort to identify some purported basis for this Court's review, Petitioners contend that the Fourth Circuit's decision below somehow preempted Virginia's common law of fraud by creating a precedent that limits the right of plaintiffs to pursue Virginia common law fraud claims. Petitioners argue that by "engrafting" the PSLRA requirement of pleading loss causation onto Virginia common law, the Fourth Circuit acted in contravention of the Securities Litigation Uniform Standards Act ("SLUSA") and this Court's opinion in *Merrill Lynch v. Dabit*, 126 S. Ct. 1503 (2006). (Pet. 14-18). Petitioners' argument is based on a distorted construction of the Fourth Circuit's opinion below. First, SLUSA has

nothing whatsoever to do with this case and neither does this Court's decision in *Merrill Lynch v. Dabit*. To be sure, this Court has previously recognized that while SLUSA may preclude use of a class action device in connection with a common law fraud claim in the securities context such as that at issue here, it does not preempt such an individual claim. The Fourth Circuit did not hold, however, that Petitioners' common law fraud claim was preempted in any shape or manner. Rather, the Fourth Circuit analyzed Petitioners' pleading in connection with Virginia's common law requirement of loss causation and determined that Petitioners' complaint simply failed as a matter of law to plead causation adequately. Petitioners simply disagree with the unanimous conclusion of the Fourth Circuit panel.[11]

The Fourth Circuit did not "federalize" Virginia common law or "morph" the PSLRA pleading standards into the common law of Virginia. (Pet. 17). Nor did the Fourth Circuit create a new requirement to plead and prove loss causation. Proximate causation, and with it "loss causation", has always been and remains an "essential ingredient" of such a claim. *See Lambert*, 44 Va. Cir. at

[11] Petitioners repeatedly attempt to suggest that the two decisions of the Fourth Circuit in this case are inconsistent. (Pet. 10). Thus, Petitioners argue that the initial Fourth Circuit panel held that the common law fraud pleading was sufficient. (Pet. 18). In fact, however, as the second panel (which included one member of the initial panel) explained (App. Pet. 6) and the record clearly supports, the only issues addressed on the initial appeal with respect to the common law fraud claim were (a) the existence of material misrepresentations; and (b) Petitioners' reasonable reliance. Initial review was limited to those issues because they were the stated basis for the District Court's initial dismissal of the claim. (*Id.*) The Fourth Circuit simply never addressed the causation element in the initial appeal. Thus, the two decisions are easily reconciled by the Fourth Circuit itself.

104. Nothing in the Fourth Circuit opinion precludes a plaintiff who properly pleads proximate causation from pursuing a common law fraud claim in Virginia.

II.

THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF FURTHER LEAVE TO AMEND THE COMPLAINT, PARTICULARLY IN LIGHT OF THE PRIOR HISTORY IN THIS ACTION, AND, IN ANY EVENT, APPLIED THE PROPER STANDARD OF REVIEW SO THERE IS NO ISSUE THAT WARRANTS THE REVIEW OF THIS COURT

Petitioners effectively seek to manufacture a relevant split in the Circuits by alleging that the Fourth Circuit should have utilized a *de novo* standard rather that an abuse of discretion standard in reviewing the district court's denial of further leave to amend their complaint. Specifically, Petitioners assert (Pet. 24) that "when a plaintiff is denied leave to amend on the basis that such amendment would be futile, the standard of review is *de novo* rather than discretionary." Petitioners then point to an alleged split in the Circuits as to the standard of review applied to a decision to deny leave to amend a complaint where the amendment would be futile. Critically, however, Petitioners entire argument is premised upon a mischaracterization of the Fourth Circuit's decision. The Fourth Circuit specifically stated: "Plaintiffs had an unprecedented thirteen months of unilateral pre-complaint discovery under Bankruptcy Rule 2004 and had already set forth four iterations of their complaint. We conclude that the district court did not abuse its discretion in ruling that the

plaintiffs' many opportunities to present their claim warranted denial of the motion to amend." (App. Pet. 11-12). Contrary to Petitioners' assertions, the denial of further leave to amend was not premised on futility alone. All of the cases cited by Petitioners recognize that in such circumstances, the abuse of discretion standard is unquestionably applicable. Indeed, Petitioners themselves cite *Lawal v. RTM*, No. 06-12250, 2006 U.S. App. LEXIS 30856, at *2 (11th Cir. Dec. 12, 2006) as apparently a case with a contrary standard (Pet. 25), but the Eleventh Circuit there stated: "A district court's refusal to grant leave to amend is **reviewed for an abuse of discretion**, although the underlying legal conclusion of whether a particular amendment to a complaint would be futile is reviewed *de novo*." (emphasis added) Since the Fourth Circuit affirmed the denial of further leave to amend based on grounds other than futility, the standard applied was correct pursuant to all the cases cited by Petitioners and there is simply no conflict as to the propriety of the standard applied by the Fourth Circuit in these circumstances. Accordingly, even if there were a conflict in the circuits as to the applicable standard of review of a decision denying further leave to amend on the grounds of futility, the Petition simply does not present an occasion to address such conflict.

Moreover, not only did the Fourth Circuit apply the correct abuse of discretion standard uniformly applied by all the Circuits under these circumstances, the underlying basis for the denial of further leave to appeal is entirely sound and fully supported by the factual record. The Petitioners previously had *four* separate opportunities to set forth a complaint against these same Respondents, and prior to filing their first complaint, they had an unprecedented

opportunity to conduct a year of unilateral pre-complaint discovery under Bankruptcy Rule 2004. Thus, unlike virtually all plaintiffs in similar circumstances, prior to drafting their complaint, Petitioners were able to subpoena documents from, and conduct depositions of, many third parties without the presence or participation of any of the Respondents. They also were able to conduct depositions and obtain documents from the Respondents. Under the unique circumstances of this case, the decision to deny further bites at the apple was clearly well-supported notwithstanding Petitioners' conclusory suggestions to the contrary (Pet. 29).

Finally, in any event, any further leave to amend the complaint would in fact be unwarranted and futile. In seeking leave to amend, Petitioners cited to twelve proposed new paragraphs for inclusion in their complaint.[12] None of the facts set forth therein was unknown or unavailable to Petitioners at the time they filed their initial pleading much less after they filed their fourth version of the complaint, and they offered no legitimate excuse for belatedly seeking to include them in a fifth version of their complaint. Given the history of the action, the Fourth Circuit properly denied Petitioners further opportunities to re-state their claims and recognized that finality was warranted. Moreover, even Petitioners' proposed amendments were futile and failed to cure the specific deficiencies in their pleadings. *See Hunt v. Enzo Biochem, Inc.*, No. 06 Civ. 170, 2006 U.S. Dist. LEXIS 89175 (S.D.N.Y. Dec. 11, 2006) (dismissing virtually identical claims subsequently

[12] Indeed, Petitioners' argument to this Court often obfuscates and confuses the allegations actually set forth in their complaint, with the allegations they subsequently sought to allege if granted further leave to amend their complaint, which leave was denied.

filed by Petitioners' counsel on behalf of different plaintiffs).

CONCLUSION

For all of the foregoing reasons, the petition should be denied together with such other and further relief as the Court deems just and proper.

Dated: February 20, 2007

Respectfully submitted,

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48

(3)

06 No. 987

In The
Supreme Court of the United States

LAWRENCE F. GLASER and MAUREEN GLASER, individually and on behalf of KIMBERLY, ERIN, HANNAH, and BENJAMIN GLASER,

Petitioners,

versus

ENZO BIOCHEM, INC., HEIMAN GROSS, BARRY WEINER, ELAZAR RABBANI, SHARIM RABBANI, JOHN DELUCCA, DEAN ENGELHARDT, and DOES 1-50,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Authorities i

Introduction 1

Argument 1

I. RESPONDENTS' POSITION BEFORE THIS COURT REGARDING THE SIGNIFICANCE OF *DURA* IS CONTRARY TO THE POSITION THAT THEY TOOK BELOW 1

II. *DURA* DOES NOT REPRESENT INTERVENING AUTHORITY IN THIS CASE 6

Conclusion 8

TABLE OF AUTHORITIES

Bank of Montreal v. Signet Bank, 193 F.3d 818 (4th Cir. 1999) 2

Dura Pharmaceutical, Inc. v. Broudo, 544 U.S. 336 (2005) ..... *passim*

Grand v. Nachio, 147 P.3d 763 (Ariz. Ct. App. 2006) 5, 7

INTRODUCTION

Petitioners submit this short reply to Respondents' Opposition to the Petition for Writ of Certiorari in order to address Respondents' claims that:

a. the Fourth Circuit's opinion "does not represent a departure from settled law, but rather a proper application of it, and as such, it does not warrant review by this Court" (Opp. Br. at 10)

and

b. that *Dura Pharmaceuticals v. Broudo, Inc.*, 544 U.S. 336 (2005) was mere surplusage because the Fourth Circuit only "cited *Dura* for its analysis and the proposition that Petitioners were required to plead loss causation under state common law. Review of that state common law issue by this Court is not warranted." Opp. Br. at 15.

ARGUMENT

I. Respondents' Position Before This Court Regarding The Significance Of *Dura* Is Contrary To The Position That They Took Below.

Recognizing that the lower courts' unwarranted extension of *Dura*, especially in light of this Court's statements limiting *Dura*, creates an issue worthy of this Court's consideration, Respondents have attempted to minimize the effect of *Dura* by portraying *Dura* as simply authority consistent with the Fourth Circuit's conclusions regarding Petitioners' alleged failure to adequately plead loss causation. Respondents, however, conveniently ignore,

in their analysis, that the first panel of the Fourth Circuit had scrutinized Petitioners' amended complaint and found, as a matter of law, that it had satisfied all the pleading requirements necessary to state a claim under Virginia common law fraud. See App. Pet. 24-29, 31. The first panel, in their decision cited *Bank of Montreal v. Signet Bank*, 193 F.3d 818 (4th Cir. 1999), as setting forth the elements necessary to state a claim under Virginia common law, which specifically included causation. The first panel reversed the district court's conclusion that Petitioners had failed to state a claim and found that Petitioners' amended complaint, as pled, was sufficient. The first panel also held that further amendment was not necessary in order for Petitioners to be able to proceed. Respondents did not file a petition for rehearing claiming that the panel had erred in finding Petitioners' claim to be sufficient including the allegation that Petitioner suffered damages as a consequence of Respondents' fraud.

After remand to the district court, Respondents, under well established principles, could not re-raise the sufficiency of the amended complaint because that issue had been conclusively determined by the first panel. Nor was the district court free to substitute its judgment for the judgment of the first panel. Indeed, under principles of law of the case doctrine, the second panel could not overrule the first panel's adjudication of this issue in this case.[1] Consequently, on remand, Respondents filed a new motion

[1] While the second panel is free to disagree with the first panel's decision as applied to a subsequent case, it could not overrule the first panel's decision because the second panel is coequal with the first. Only the Fourth Circuit en banc could change the first panel's decision as applied to Petitioners.

to dismiss, claiming that this Court's decision in *Dura* was an intervening authority, which permitted the district court to reconsider the sufficiency of the complaint. In the first page of their memorandum in support of their motion, Respondents stated:

> "[O]n April 19, 2005, subsequent to the Fourth Circuit's decision in this action, the United States Supreme Court issued the widely reported landmark decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. __ (2005) Slip Op. April 19, 2005 (a copy of which is attached for the convenience of the Court as Exhibit E to the Chase Declaration). In the *Dura Pharmaceuticals* case, the Supreme Court addressed analogous fraud claims and specifically rejected the inflated purchase price approach to causation relied upon by plaintiffs in their pleadings. The Supreme Court stressed that such a causation approach is inconsistent with well-established common law causation principles. Indeed, the U.S. Supreme Court's discussion of the requisite pleadings to establish causation of alleged losses at common law in this securities trading context leaves no doubt that the plaintiffs' pleadings of common law fraud must be rejected as a matter of law." Memo at 1-2.

And if there can be any doubt as to Respondents reliance on *Dura* as the basis for rearguing their motion to dismiss, their own heading makes clear that *Dura* was the focal point of their claim. "Plaintiffs common law fraud claim must be dismissed because Plaintiffs do not plead and are unable to plead sufficient causation as articulated by the Supreme Court in the recent *Dura Pharmaceuticals* case." Memo at 7, R. 0029.

In their reply brief in the district court, Enzo argued "First, as we noted, the *Dura Pharmaceutical* case was decided subsequent to the Fourth Circuit's in this matter. One well-recognized exception to the law of the case doctrine is the issuance by a higher authority of a contrary decision of law applicable to the issue. (Citations omitted) . . . In all events, there can be little doubt that the *Dura Pharmaceuticals* decision would have had a serious impact on the Fourth Circuit had it been issued prior to their Opinion." Reply Memo at 9, R. 155. Again, in their reply, Respondents used the same heading as they did in their initial brief claiming that the "Plaintiffs' Common Law Fraud Claim Must Be Dismissed Because Plaintiffs Do Not Plead, and are Unable to Plead, Sufficient Causation as Articulated by the Supreme Court in the Recent Dura Pharmaceuticals Case." Reply Memo at 4, R. 150. In fact, Respondents' subheading was entitled, "Plaintiffs' Attempts to Establish Causation and Distinguish the Dura Pharmaceuticals Case Are Without Merit." *Id.* These characterizations of *Dura* were in fact, essential to their position and to their argument. If *Dura* was not an "intervening authority" then neither the district court nor the second panel had the authority to reexamine the first panel's decision that Petitioners had sufficiently pled their common law claim.

Respondents' remarkable shift in position can only be explained by their tacit acknowledgment that this Court's decision in *Dura* was misused by the district court and the second panel of the Fourth Circuit, who affirmed the dismissal. Respondents also completely shy away from the district court's basis for dismissing Petitioners' claim – that Petitioners had sold their stock prior to the alleged

corrective announcement at the RAC meeting. The claimed requirement of ownership at the time of the corrective disclosure is solely based on *Dura* and is not contained or addressed in any of the Virginia common law cases cited by Respondent.

Petitioners respectfully submit that contrary to Respondents' contention it is not a "well settled principle" of Virginia common law or any other state's common law that in a misrepresentation common law fraud case, that the plaintiff must prove that he owned the stock when a public disclosure of the truth was made and the stock price declined thereafter. The Arizona Court of Appeals in *Grand v. Nachio*, 147 P.3d 763 (Ariz. Ct. App. 2006) recently rejected the Fourth Circuit's characterization of this requirement as a "well settled principle of common law" finding that the Fourth Circuit's (second panel) decision was the only appellate court which had imposed such a requirement. *Id.* at 774. The Arizona court also held that such a showing was not required by *Dura*.[2] *Id.* at 775. While *Dura* in fact discussed a number of well settled principles of common law, none of them support the basis for the reversal of the first panel's decision in this case.

Respondents continually cite to a mythical requirement that a plaintiff must plead and prove loss causation at the complaint stage. Opp. Br. at 8-10. Respondents ignore the well-settled pleading rule that for purposes of a motion to dismiss, all the facts contained in the complaint,

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[2] In *Grand*, the appellate court reversed the trial court's entry of summary judgment in favor of the defendant on the ground that the plaintiff had sold its stock prior to the disclosure of the truth and therefore under *Dura*, its claim was barred.

including causation, are taken as true. No proof is necessary at this stage. It is only in the context of the PSLRA that a plaintiff's obligation to demonstrate more than just an allegation of fact is required. The Respondents' continued reliance upon the assertion of contested facts, e.g., characterization of the Petitioner as a "day trader" rather than an investor, is an intentional effort to obfuscate the issue now before the Court. There is no question that the only facts material to the sufficiency of the Petitioners' pleading are those alleged in the complaint. Those very facts relied upon by the first panel in upholding the sufficiency of Petitioners' claim.

II. *Dura* Does Not Represent Intervening Authority In This Case.

Petitioners agree that this Court's decision in *Dura* did not represent a departure from well-settled law in state common law fraud cases and in fact, does not even apply to that category of claims. Rather, *Dura* was expressly limited to class action claims based upon a fraud on the market theory. 544 U.S. at 342. More importantly, the second panel's ruling that "*Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed" (*Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 477 (4th Cir. 2006)) is expressly contrary to this Court's decision. This Court's decision in *Dura* did not limit a plaintiff to one method of proving loss causation in misrepresentation fraud cases. The second panel's decision in *Glaser* has not been adopted by any other circuit or any

state appellate court.[3] This Court granted certiorari in *Dura* in order to correct a disparity in the pleading requirements for federal class actions based upon a fraud-on-the-market theory of fraud between the Ninth Circuit and the other circuits. The disparity between the second panel's mandatory pleading requirement and the other circuits is far greater and expressly contrary to this Court's decision in *Dura*. There can also be no question that the impact and injustice of the second panel's decision is far greater than that of the Ninth Circuit's liberal pleading standard in fraud-on-the-market theory cases. The Ninth Circuit placed no limitation on a loss causation defense while the second panel's pleading requirement effectively gives the alleged wrongdoer absolute immunity from a misrepresentation fraud claim so long as there is no public disclosure of the truth.

Consequently, *Dura*, based upon the express language of this Court's decision, did not constitute an intervening authority and for the reasons stated in Petitioners' petition herein provided no basis for the lower courts' reversal of the first panel's decision.

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[3] See *Grand v. Nachio*, 147 P.3d 763 (Ariz. Ct. App. 2006). In *Grand*, the Court of Appeals of Arizona specifically rejected the second panel's ruling that "*Dura* requires plaintiffs to plead loss causation by alleging that the stock price fell after the truth of a misrepresentation about the stocks was revealed." *Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 477 (4th Cir. 2006) at 774. The Arizona Court of Appeals' opinion succinctly illustrates how the second panel misconstrued *Dura*'s requirements both for pleading loss causation and showing or proving loss causation. Since there is no serious question that loss causation need not depend on prior public disclosure of the defendant's misrepresentations (see *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 (2d Cir. 2005)), the second panel's imposition of such a showing as a pleading requirement is wholly inconsistent with *Dura*.

Petitioners submit that this Court's clarification of the scope and application of its decision in *Dura* to common law misrepresentation fraud claims involving the purchase or sale of securities is critical to the orderly prosecution and disposition of such claims in both federal and state trial courts in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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